

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

Nos. 77-1136, 77-1137.

To be argued by: MARTIN G. WEINBERG.

United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
APPELLEE,

v.

KEVIN T. COONEY AND
HAROLD J. LEVY,
APPELLANTS.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Appendix to Brief for Defendants-Appellants
Kevin T. Cooney and Harold J. Levy.

Volume II.
Pages 304-613.

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(1293)

* * *

- 1 my own bookstore in Troy, New York.
- 2 Q And what was the name of that bookstore?
- 3 A The Book Bazaar.
- 4 Q And I direct your attention to July, 1972, and did
- 5 there come a time when you met Miss Sandra Brooks?
- 6 A In 1972?
- 7 Q Yes, in 1972.
- 8 A Yes.
- 9 Q And did there come a time when you met Miss Brooks in
- 10 your bookstore?
- 11 A Yes, she came to my bookstore in Albany.
- 12 Q About when?
- 13 A Approximately late June of 1972.
- 14 Q And were you in your bookstore, at the time?
- 15 A Yes, sir, I was.
- 16 Q And do you recall having a conversation with Miss
- 17 Brooks?
- 18 A Yes.
- 19 Q And do you recall what she said to you?
- 20 A What she said?
- 21 Q Yes.
- 22 A Yes.
- 23 Q What did she say?
- 24 A Miss Brooks explained to me that she had had a fight --
- 25 Q Did she make a request of you?

* * *

1 license plates on it.

2 Q Did you see any other vehicles?

3 A Just Buddy's and mine.

4 Q Now, did there come a time when you had met a lady
5 by the name of Maragret Boucher, and is that how you
6 pronounce the last name?

7 A Right.

8 Q And when did you meet Miss Boucher?

9 A April of 1973.

10 Q And where did you meet her?

11 A She was a bank teller at the Bank of New York, in
12 Albany.

13 Q And under what circumstances did you meet her?

14 A My bookstore had an account there, and we had numerous
15 conversations back and forth about having lunch
16 together or dinner together.

17 Q And did there come a time when you socialized with
18 Miss Boucher?

19 A Yes.

20 Q And frequently?

21 A Privately together, yes, sir, at numerous times.

22 Q Now, did there come a time that you introduced Miss
23 Boucher to Mr. Harold Levy?

24 A Yes.

25 Q And when?

- 1 A I invited Miss Boucher out for a casual dinner.
- 2 Q When was that?
- 3 A It was approximately May of 1973, and Mr. Levy and
4 myself --
- 5 Q When did you meet Miss Boucher, and in what month?
- 6 A April. And, Mr. Levy and myself, and Miss Boucher
7 went out for dinner.
- 8 Q Now, after you met Miss Boucher in April of 1973,
9 did there come a time when you went to Mr. Levy's
10 house?
- 11 A Yes.
- 12 Q And when?
- 13 A Early May of -- just a few days later, after we went
14 out.
- 15 Q And under what circumstances did you go to the house.
16 Was it a social visit?
- 17 A Well, it was a social visit, as well as I was there --
18 I was there to pick something up.
- 19 Q Who did you go with?
- 20 A Miss Boucher and myself.
- 21 Q Who else was present when you got there -- strike that.
22 Where did you go?
- 23 A To 85 Old Loudon Road.
- 24 Q And who was present at 85 Old Loudon Road?
- 25 A At that present time, it was just Mr. Levy, and Sandra

1 Brooks.

2 MR. RYAN: Would you fix a time, please?

3 BY MR. DREYER:

4 Q Yes. Again, first of all, when was this that you went
5 to 85 Old Loudon Road?

6 A It was approximately the first week in May.

7 Q And about what time of day?

8 A I would say it was somewhere around four or five o'clock
9 in the afternoon.

10 Q After you arrived at 85 Old Loudon Road, what, if anything,
11 do you recall occurring?

12 A Well, Meg and I arrived, or Miss Boucher and I arrived
13 at 85 old Loudon Road, and the same lime-colored Fury
14 was in the driveway, and Mr. Levy was waiting until
15 nightfall to unload the car.

16 Q And who else was present, now?

17 A Well, later on, Mr. Katz and Mr. Lefebvre showed up.

18 Q Now, did there come a time at nightfall when you went
19 to that automobile?

20 A Yes, after it got dark, we were asked to help unload
21 the vehicle.

22 Q And what, if anything, did you do?

23 A We went out to the trunk, and we unloaded various
24 large green suitcases, or zipper suitcases, and took
25 them upstairs to the back room of Mr. Levy's house.

1 Q Is that the first time that you had been to that
2 back room?

3 A No.

4 Q And do you recall what the interior of the house looked
5 like?

6 A Yes.

7 Q Would you describe it for the members of the jury?

8 A Well, it was a double story, small, red house with a
9 living room, dining room, and kitchen on the first
10 level; two bedrooms and a bathroom on the second level
11 upstairs.

12 Q And did you look inside any of those rooms?

13 A Well, when you walked in the front door, facing you
14 was a staircase.

15 When you walked upstairs and went
16 straight ahead that was an empty room, and to your
17 left was their bedroom, and to the right was the bath-
18 room.

19 Q Now, on the evening in question, you stated that you
20 helped unload the automobile?

21 A Right.

22 Q And where did you take the green bags?

23 A We took them upstairs to the empty bedroom.

24 Q And do you recall how that bedroom appeared?

25 A Well, that bedroom had a hardwood floor, and one marble

1 table with a scale on it, and there was a large trunk
2 in the -- in the bedroom.

3 Q And what happened after you put the green -- I think
4 they were garment bags, up in that room?

5 MR. LEONE: I object. I believe that
6 the testimony was suitcases, and now we are calling
7 them garment bags?

8 MR. DREYER: All right.

9 THE COURT: Let him tell you.

10 BY MR. DREYER:

11 Q What happened after you all brought that luggage up
12 to that bedroom?

13 A Mr. Lefebvre, Mr. Katz and myself requested amounts
14 of Marijuana to be distributed.

15 Q And did you receive something from their -- from
16 anyone at the apartment?

17 A Yes, sir.

18 Q And from whom?

19 A I received -- well, after Mr. Katz and Mr. Lefebvre
20 received their amounts, I received, I think the
21 quantity was somewhere about twenty-five and fifty
22 pounds.

23 Q Did you give something to anyone in charge, for that?

24 A No, not at that time.

25 THE WITNESS: Your Honor, could I request

* * *

1 some skis and a tool box.

2 Q Did there come a time when you met a man by the name
3 of Bruce -- strike that.

4 MR. DREYER: Was there an objection?

5 MR. RYAN: Yes.

6 BY MR. DREYER:

7 Q Did there come a time when you met a man by the name
8 of Bruce?

9 A Yes.

10 Q When did you meet Bruce?

11 A In November of 1973.

12 Q And where did you meet him?

13 A At Mr. Levy's residence in Crescent.

14 Q Was that person Bruce introduced to you at this time?

15 A Yes.

16 Q And did you know his last name, at the time?

17 A No.

18 Q And who was present when you saw this person, Bruce,
19 at Mr. Levy's house?

20 A Myself, Miss Boucher, Mr. Levy and Sandra Brooks.

21 Q And under what circumstances did you -- did you see
22 this person, Bruce?

23 A I had received a call from Mr. Levy.

24 Q When?

25 A Early in the day, because I had inquired whether or not

MR. DREYER: Let the record reflect

1 that the Defendant Kay was identified.

2 BY MR. DREYER:

3 Q Now, directing your attention back to the period
4 of November, 1973, when you were at Mr. Levy's house,
5 and you met Bruce: what occurred that night, or that
6 day?

7 A Later on that -- well, later on, approximately an
8 hour to two hours later, Mr. Katz and Mr. Lefebvre came
9 out to the house, as well, and we helped unload the
10 vehicle, and we took Marijuana to that third bedroom
11 in the back.

12 Q And what happened after that?

13 A It was divided up among the people who were there.

14 Q And do you recall receiving a quantity?

15 A At that time, I don't remember whether or not I
16 received a quantity of it.

17 Q And what happened after that incident? Did you leave?

18 A Well, we stayed around then and talked for a while
19 and then myself, and Miss Boucher and I left.

20 Q What was your occupation in the fall of 1973?

21 A I was still the bookstore owner. At that time,
22 I had three bookstores.

23 Q And did there come a time in the fall of 1973 when
24 you decided or planned to open a new business?

1 Q And what type of business?

2 A It was a western-wear, and American-Indian jewelry,
3 a shop.

4 Q And when did you start planning for that opening?

5 A Oh, approximately October of 1973, I started to put
6 together my thoughts, and contacted various outlets
7 out west about obtaining western clothing and American-
8 Indian jewelry.

9 Q And when did that business actually open, if it did
10 open?

11 A Not until late March of 1974.

12 Q And where did it open?

13 A It opened in 1970 Central Avenue in Colonie.

14 Q And prior to opening that business, did you have
15 occasion to make any trips in connection with the
16 opening of the business?

17 A Yes. In January of 1974 the western-wear manufacturers
18 had a convention or display of all of their merchandise
19 in Denver, Colorado.

20 Q And did you go to that convention?

21 A Yes, I did.

22 Q And when?

23 A It was approximately the first week of January, of
24 1974.

25

* * *

THE WITNESS: In Tucson.

BY MR. DREYER:

Q Did you have occasion, after that conversation, to travel someplace?

A Yes, I took Frontier Airlines down to Tucson.

Q And when did you arrive in Tucson?

A About a day after our conversation on the telephone.

Q And who did you see in Tucson?

A Well, Kevin picked me up at the airport.

Q And was he with anyone at that time?

A No, sir.

Q And what happened after he picked you up at the airport?

A We went back to his house, where Kristine Cooney was there, and Kevin was there.

Q And how long did you stay in Tucson?

A Well, approximately almost four days.

Q Now, did there come a time after you arrived at Mr. Cooney's house that you took another trip?

A Yes.

Q When?

A Kevin asked me if I wanted to take a trip to Mexico.

Q And when was that?

A Approximately two days after I had arrived in Tucson.

Q And did he say anything else when he asked you that?

1 A Just the fact that we would go across the border.

2 Q And what did you say?

3 A I agreed. I said fine.

4 Q And did there come a time when you left Tucson?

5 A Yes. The day after we talked about it, we headed
6 south to the border.

7 Q And what happened? Describe the trip.

8 A Well, we came to the border and we went through
9 Customs --

10 THE COURT: How did you go?

11 THE WITNESS: Oh, Mr. Cooney's car.

12 BY MR. DREYER:

13 Q And what kind of a car was it?

14 A A Volvo.

15 Q And do you recall the color?

16 A Dark green . A little bit darker than my shirt.

17 Q And describe the trip, to the members of the jury?

18 A We left the border, and we traveled approximately
19 an hour -- well, approximately an hour south, heading
20 toward Nogales.

21 Q And did there come a time when you reached Nogales?

22 A No, we turned off and we were headed down a road
23 that I wasn't familiar with, and we came to a large
24 house.

25 Q And what happened when you reached this large house?

1 A Kevin asked me to stay in the car. There was a man
2 outside who seemed to be waiting for him.

3 MR. LOMBARDINO: I object.

4 THE COURT: You can't characterize.

5 Just describe what you saw.

6 BY MR. DREYER:

7 Q What did you see?

8 First of all, did you stay in the car?

9 A Yes.

10 Q And what happened after that?

11 A Kevin went to the trunk of the car, opened it up, and
12 it had an attache case, and he took it and gave it
13 to the gentleman who was waiting outside of the house,
14 when we arrived.

15 Q And what happened after that? Did the man take the
16 attache case?

17 A Yes.

18 Q And what happened after that?

19 A There was a conversation -- like they weren't too far
20 from the car.

21 There was a conversation in Spanish,
22 and then Kevin brought the gentlemen over to my side
23 of the car, and introduced me.

24 Q And what happened?

25 A He, in Spanish, said my name, Pablo, which is Paul,

1 and he introduced me to a fellow whose name was Pasquale

2 Q And did you shake hands with this person?

3 A No.

4 Q And did you speak to this person?

5 A No, just, you know, hello.

6 Q After you met this individual who was introduced to
7 you as Pasquale, what happened?

8 A Kevin and Mr. Pasquale went away from my side of the
9 car, and talked for a few minutes. They shook hands
10 and Kevin got back in the car, and we drove back toward
11 Tucson.

12 Q Did there come a time when you had a conversation
13 in the automobile, on the return trip?

14 A Yes.

15 Q And what was it -- do you recall the conversation?

16 A Well, the conversation -- I was very inquisitive --

17 Q Just tell us: do you recall the conversation?

18 A Yes.

19 Q And what did you say to Mr. Cooney?

20 A I asked him who this Pasquale was.

21 Q And did Mr. Cooney respond to you?

22 A Yes.

23 Q And what did he say?

24 A He said Mr. Pasquale was the Mexican connection.

25 Q And did he tell you anything -- did Mr. Cooney tell

* * *

1 A Well, previously, yes.

2 Q And when?

3 A The last week in May of 1974.

4 Q And for what purpose did you see them?

5 A Sonny and Kristine Cooney came in for an American-
6 Indian jewelry show to be held at my store.

7 Q And did you see both of them?

8 A Yes.

9 Q How long did -- strike that. How long did Sonny and
10 Mrs. Cooney stay?

11 A Approximately four days, at my house.

12 Q Now, prior, and do you know where they went -- did
13 they tell you where they were going after they left
14 your house?

15 A Back to Tucson.

16 Q Prior to their leaving, did there come a time when
17 you and Mrs. Cooney had a conversation, in the
18 presence of Harold Levy?

19 A Yes.

20 Q And when did that take place?

21 A Out at Mr. Levy's residence.

22 Q Which is where?

23 A In Crescent, New York.

24 Q And who was present at the time that you had this
25 conversation?

1 A Miss Boucher and myself.

2 Q And about when was that; what time of day?

3 A It was in the evening. It was after the store had
4 closed, and the show was over.

5 Q Do you recall what you said?

6 A We were discussing the fact that I was having financial
7 trouble.

8 Q And who did you say that to?

9 A To Kristine.

10 Q And did either Mr. Levy or Mrs. Cooney say anything
11 to you?

12 A No, they didn't. The conversation then went on to
13 Miss Boucher.

14 Q And what happened then, and was Miss Boucher present?

15 A Yes, she made a suggestion that we drive a load of
16 Marijuana for -- you know, for them.

17 Q And did anybody say anything in response to that?

18 A Kristine mentioned that it would have to be worked
19 out with Kevin.

20 Q And did Mr. Levy say anything?

21 A He had talked to Miss Boucher, and from my understanding
22 he was not in objection to it.

23 MR. LOMBARDINO: I did not hear that.

24 MR. DREYER: I move to strike that.

25 THE COURT: Strike what?

* * *

1 Q When did you leave the Albany area?

2 A Approximately the second week of June.

3 Q And was it after you received this letter?

4 A Yes.

5 MR. LOMBARDINO: The year, please?

6 THE WITNESS: 1974.

7 BY MR. DREYER:

8 Q And where did you go?

9 A To Tucson, Arizona.

10 Q And with whom did you go?

11 A With Miss Boucher.

12 Q And how long did it take you to get to Tucson, Arizona?

13 A Approximately three and a half days.

14 Q And do you recall arriving in Tucson?

15 A Yes.

16 Q And what, if anything, occurred when you got to Tucson?

17 A We were on the outskirts of Tucson, and we stopped
18 to get gas. I called Mr. Coonis from a telephone booth.

19 Q And what, if anything happened when you called him?

20 A Kevin dropped out and met us at the gas station.

21 Q And what happened after he met you?

22 A Miss Boucher and I followed him back to his house.

23 Q And where did you go?

24 A To his house.

25 Q And it was the same house that you had been to previously?

1

A No.

2

Q What house was it?

3

A I am not -- you know, it was at nighttime, and I
4 don't know the address.

5

Q And did you stay in Tucson at Mr. Cooney's house?

6

A Yes, we did.

7

Q And how long did you stay?

8

A Approximately four days.

9

Q Now, after you arrived what, if anything, occurred
10 on the following day, after you arrived at Tucson?

11

A Well, the car that -- well, the car, Miss Boucher, and
12 I was driving, we took it over to another house, and
13 we loaded it up with Marijuana.

14

Q And which car was that?

15

A The Buick Electra.

16

Q And had you seen that Buick Electra previously?

17

A Yes.

18

Q Where?

19

A The same one we drove out in.

20

Q And had you seen it before you drove out in it?

21

A Yes, the same one that Sonny brought in, in May.

22

Q Now, on the day that you loaded the Buick Electra,
23 did you prepare the car in any way?

24

A The only thing that we did to prepare the car was
25 inflate the air shocks.

- 1 Q And what did you inflate them with?
- 2 A A portable unit that pumped air into it.
- 3 Q And where was that pump and unit kept?
- 4 A At the house where the Marijuana was.
- 5 Q And how much Marijuana did you load into the vehicle?
- 6 A It was approximately almost four hundred pounds.
- 7 Q And what kind of case were they kept in?
- 8 A They were -- we loaded them into large zipper garment
- 9 bags.
- 10 Q And what color were the garment bags?
- 11 A Green -- dark.
- 12 Q And what did you do with the Marijuana?
- 13 A We loaded it into the trunk of the Buick Electra.
- 14 Q What happened after you loaded it?
- 15 A We rushed back to Mr. -- to Kevin's house.
- 16 Q And did there come a time that you left Tucson?
- 17 A Yes.
- 18 Q And when?
- 19 A The following day.
- 20 Q And where did you go?
- 21 A I headed back to the Albany area.
- 22 Q And was Meg with you at the time?
- 23 A No.
- 24 Q Where was Miss Boucher?
- 25 A We had had an argument and she preferred to drive --

1 no, to fly back.

2 Q And where was she?

3 A She was still in Tucson.

4 Q And how long did it take you to get to the Albany area?

5 A Approximately four days.

6 Q And did there come a time when you arrived in Albany?

7 A Yes.

8 Q And what was your destination?

9 A Mr. Levy's residence in Crescent.

10 Q And did there come a time when you arrived in Crescent?

11 A Yes.

12 Q And what did you do?

13 A I pulled the Buick Electra up to the outside of the
14 house, and then I left.

15 Q And did you see Mr. Levy on that occasion?

16 A For a few minutes, yes.

17 Q And where did you go?

18 A I went back to my home in Albany.

19 Q Now, did you receive anything for your trip to Tucson?

20 A There was an arrangement made, yes, for a payment.

21 Q Between whom?

22 A Between Buddy -- Mr. Levy and Miss Boucher.

23 Q And what was that arrangement, do you recall?

24 A It was twelve hundred dollars for driving the Marijuana.

25 Q And after you returned, did you receive any payment?

* * *

1 Q And what time in August?

2 A Approximately the second week in August.

3 Q And where did you see him?

4 A At Mr. Levy's residence, at Crescent.

5 Q And would you be able to recognize him if you saw him
6 again?

7 A Yes.

8 Q And would you look around the Courtroom?

9 A Yes.

10 Q And he is here?

11 A Yes, he is.

12 Q Where?

13 A He is the end gentleman over on the right.

14 MR. DREYER: Let the record reflect
15 that the witness pointed to Defendant Lefebvre.

16 THE COURT: All right.

17 BY MR. DREYER:

18 Q Who was present when you saw him at Crescent, in
19 August?

20 A Miss Boucher, myself, Mr. Levy and Mr. Katz.

21 Q And what did you observe ?

22 A Mr. Lefebvre had driven in a car from Tucson.

23 Q And did you observe the car?

24 A Yes.

25 Q And what kind of a car was it?

1 A A gold --

2 Q You don't recall?

3 A No, I don't recall right now.

4 MR. LOMBARDINO: I did not hear that.

5 MR. DREYER: He didn't recall.

6 BY MR. DREYER:

7 Q What did you observe after the vehicle pulled in?

8 A Well, excuse me, that evening we all got around, and
9 we were talking, and then we later on unloaded the
10 vehicle.

11 Q Who was we, and who unloaded the vehicle?

12 A Myself, Mr. Katz, and Mr. Lefebvre.

13 Q And what, if anything, was done with it?

14 A It was taken to the back room.

15 Q And what back room?

16 A In Mr. Levy's residence in Crescent.

17 Q Did you receive anything from that quantity?

18 A No.

19 Q And can you describe the cases in which the Marijuana
20 was packed?

21 A The similar same green garment bags.

22 Q Now, do you know a man by the name of Paul Cammusa?

23 A Yes.

24 Q And when did you meet Mr. Cammusa?

25 A In 1973.

1 Q And where did you meet Mr. Cammusa?

2 A At Mr. Katz' residence on Central Avenue.

3 Q And did you see Mr. Cammusa socially?

4 A Yes.

5 Q And frequently?

6 A Yes.

7 Q After you saw Mr. Lefebvre on August of 1974, did
8 you have occasion to see Mr. Cammusa?

9 A Yes.

10 Q Frequently?

11 A Yes.

12 Q And did there come a time in the fall of 1974 when
13 Mr. Cammusa visited you?

14 A Yes.

15 Q And where did he visit you?

16 A At my new home. I moved from 220 Hansen to 8 Stoney
17 Brook Drive in Rexford.

18 Q And do you recall when Mr. Cammusa visited you in
19 Rexford?

20 A It was approximately the first week in November.

21 Q And who was present when Mr. Cammusa visited you?

22 A Miss Boucher and myself.

23 Q And did Mr. Cammusa say something to you?

24 A Yes. He told me that he had had a fight with Mr. Katz
25 that he wanted nothing to do with him any longer, and

1 could I obtain large quantities of Marijuana for him.

2 Q I am sorry, I did not hear the last part and would
3 you repeat that?

4 A He asked me if I could obtain large quantities of
5 Marijuana for him.

6 Q Did he say anything else? Is that what you recall?

7 A Well, the only other thing he asked me: could it
8 be arranged through Kevin.

9 Q And did you respond to him?

10 A I told him that I would see what I could do.

11 Q Now, did you end the conversation at that time?

12 A Yes.

13 Q And what, if anything, happened after that?

14 A Well, I asked Miss Boucher if she would have a talk
15 W with Mr. Levy about making arrangements to obtain
16 Marijuana, large quantities of Marijuana for Mr.
17 Cammusa.

18 Q And you did not talk to Mr. Levy, yourself?

19 A I had occasion later on to talk to Mr. Levy, after
20 Miss Boucher talked to him.

21 Q And you were not present when Miss Boucher talked
22 to him?

23 A No.

24 Q Did there come a time when you communicated with Mr.
25 Cammusa again?

* * *

1 Q And you also dealt in Marijuana, didn't you?

2 A Yes.

3 Q And as a matter of fact, you dealt in other things that
4 Mr. Abrams did not deal in? You dealt in Heroin and
5 you dealt in Cocaine?

6 A I never dealt in Heroin..

7 Q You never did?

8 A No.

9 Q Now, did you visit your friend out in Arizona?

10 A Nope.

11 Q And did you ever call any of them to tell them that
12 you were out there?

13 A Nope.

14 Q And did you ever tell anyone that you went out to
15 see Mr. Cooney, and watched the Super Bowl?

16 A No.

17 Q Did you ever tell that to Mr. Cohen?

18 A Nope.

19 Q To Mr. Roth?

20 A No.

21 Q To anyone?

22 A The only person that knew about it was Margaret Boucher.

23 Q Margaret Boucher. By the way, was Margaret Boucher
24 also taking Heroin, when she was living with you?

25 A Was she also doing Heroin?

1 Q Yes.

2 A Yes.

3 Q And you both used to sit up at night and shoot-up
4 together?

5 A Now, what type of drug?

6 Q Heroin, let's talk about that?

7 A There was only one occasion that that happened.

8 Q She shot up Heroin with you?

9 A Right.

10 Q And how about Cocaine, and didn't Margaret Boucher
11 she worked in a bank, didn't she shoot Cocaine up with
12 you?

13 A Right.

14 Q Now, you told her about your trip, didn't you?

15 A Right.

16 Q Now, this was the first of two trips? You are certain
17 about that, right?

18 A Right.

19 Q And you did not bring back any Marijuana the first
20 time, did you?

21 A No.

22 Q And you just went out there, and spent three or four
23 days staying high?

24 A Right.

25 Q And by the way, when you went to the airport -- the airplane

1 the Frontier Airlines, did you get on that plane in
2 a state of being high?

3 A Yes.

4 Q And you flew back to Colorado?

5 A Right.

6 Q And the next time that you say that you went there,
7 was the second and last and only time that you went
8 there, right?

9 A Right.

10 Q And you went out there with your female companion,
11 who would sit up with you and shoot Cocaine, into your
12 arms, isn't that correct?

13 A Correct.

14 Q And how did you get out there?

15 A We drove out in a Buick Electra.

16 Q Sir?

17 A We drove out in a car that we picked up at Mr. Levy's
18 house.

19 Q You drove out in a car. Are you sure about that?

20 A Mm-hmm.

21 Q And when you went out there, with this car, it took
22 you some three and a half days, according to your
23 testimony?

24 A Mm-hmm.

25 Q And where did you stop and stay?

* * *
1 for Identification.)

2 BY MR. LOMBARDINO:

3 Q Would you take a look at Defendants' Exhibit H
4 and I refer you to paragraph three, and would you
5 look at that, Mr. Moscowitz (Offering)?

6 Did you read it, Mr. Moscowitz?

7 A Yes.

8 Q May I have it back, please. Do you want to read it
9 again?

10 A Yes, I would like to.

11 Q Sure, read it again. Did you read paragraph three?

12 A Yes.

13 Q Now, may I have it back.

14 A Yes. (Offering).

15 Q Now, isn't it a fact that you told Agent Tripp that
16 you never drove back any Marijuana, that there was
17 a misunderstanding with Meg, and you returned to the
18 state of New York?

19 A Correct.

20 Q And when you told that to Agent Tripp, was that the
21 truth, or was that a lie?

22 A That I --

23 Q That you didn't bring back Marijuana in June of 1974 --
24 you lied to Mr. Tripp?

25 A Right, that was a lie.

1 Q And that was before you went to the Grand Jury?

2 A Correct.

3 Q Now, before going into the Grand Jury, did you tell
4 Mr. Dreyer that you lied to Agent Tripp when you told
5 him, on September 26th, 1975, that you never brought
6 back Marijuana from Arizona? Did you tell it to him?
7 And I refer to this gentleman here, did you tell him
8 you lied about that to Agent Tripp?

9 A No, I told Ray Tripp.

10 Q And when did you tell Agent Tripp that you lied?

11 A When he was questioning me about -- about Meg Boucher.

12 Q And when you went into the Grand Jury, did you tell
13 those good people there that listened to your story
14 that you had lied about this trip?

15 A No.

16 Q And when was the first time that you ever told Mr.
17 Dreyer the fact that you lied about this trip, or
18 did you ever tell it to him?

19 A From what I understood, he was supposed to have learned
20 it from Mr. Tripp.

21 Q Mr. Moscowitz, I am asking you if you ever told Mr.
22 Dreyer that you lied to Agent Tripp about bringing
23 back Marijuana from Kevin Cooney? Did you ever tell
24 it to him?

25 A Not that I recall.

1 Q Now, when you now went into the Grand Jury, and incidentally
2 was your memory better when you were telling agent
3 Tripp about the facts, or did your memory get better
4 later on, when months passed, and you were then called
5 to the Grand Jury?

6 When did your memory get better?

7 A When I was incarcerated at Saratoga Jail. I wrote a
8 diary of everything that I could possibly put down
9 in my mind regarding this case, and, at that time, I
10 was very angry at Miss Boucher and I wanted her to be
11 indicted, too, as well.

12 Q And because you were angry at Miss Boucher, you wanted
13 her to be indicted --

14 THE COURT: You are talking to the jury
15 again. You will have an opportunity to talk to them.

16 MR. LOMBARDINO: I am sorry.

17 THE COURT: You should direct your
18 questions to the witness.

19 MR. LOMBARDINO: I am sorry.

20 BY MR. LOMBARDINO:

21 Q And because you were angry at that woman, whom you
22 lived with and shot-up together with, you testified
23 and told things to Agent Tripp, that caused her to be
24 indicted?

25 MR. DREYER: Objection, Your Honor. It is

1 a misstatement.

2 MR. LOMBARDINO: Well, Your Honor, that
3 is what the witness said.

4 THE COURT: Wait a minute. Read back
5 the last two questions and answers.

6 (The previous two questions and answers
7 were read by the Reporter.)

8 THE COURT: What is your objection?

9 MR. DREYER: It is a misstatment of what
10 Mr. Moscowitz said.

11 MR. LOMBARDINO: That is my question.

12 THE COURT: I will let him answer it.

13 THE WITNESS: Miss Boucher was not
14 indicted.

15 BY MR. LOMBARDINO:

16 Q You wanted to see if you could have her indicted, isn't
17 that a fair statement?

18 A Yes, sir.

19 THE COURT: I think it is nearly time
20 for our luncheon recess and I want to ask you: how
21 much more do you have? It will be a short afternoon.

22 MR. LOMBARDINO: I am afraid I have
23 a lot. I will do the best I can but there is a lot
24 of material that I want to cover.

25 THE COURT: About how much more, do you

1 know, in time?

2 MR. LOMBARDINO: Well, I will do my
3 utmost to conclude within an hour.

4 THE COURT: All right.

5 Ladies and Gentlemen, we will take our
6 luncheon recess and remember my instructions, and be
7 careful and don't talk to anyone about this case.
8 We will come back at two o'clock.

9 (Whereupon, the jury was excused.)

10 THE CLERK: Court stands in recess
11 until two p.m.

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AFTERNOON SESSION

(Whereupon, after the luncheon recess, at two p.m., the following proceedings were held before the Court and the jury.)

CROSS EXAMINATION (Continuing)

BY MR. LOMBARDINO:

Q Mr. Moscowitz, did you speak with anyone during the luncheon recess?

A I saw Mr. Dreyer, yes.

Q And did you speak with Mr. Dreyer during the luncheon recess?

A Just for a second.

Q All right. Now, Mr. Dreyer -- I am sorry, I apologize -- Mr. Moscowitz: I believe the last question, or one of the last questions I proposed to you before the luncheon recess was the statement that you made to Agent Tripp, concerning this trip to Arizona, where you said that you lied to Agent Tripp?

THE COURT: You have to answer, and you cannot shake your head.

THE WITNESS: Yes.

BY MR. LOMBARDINO:

Q Mr. Moscowitz, when did you go before the Grand Jury

1 and testify in this case?

2 A Approximately the second week of November of 1975.

3 Q And during this period of time, were you then residing
4 where you are now, and that is in the County Jail?

5 A No.

6 Q You were out on bail?

7 A Correct.

8 Q Now, before going into the Grand Jury to testify, and
9 before -- withdrawn.

10 Before going into the Grand Jury to
11 testify, and while you were out on bail, and after
12 you had told the lie to Agent Tripp, did you start to
13 prepare your diary?

14 A No, I had not.

15 Q And when did you prepare that diary?

16 A While I was incarcerated in Saratoga County Jail.

17 Q And when you went there and spoke to Agent Tripp and
18 told him this lie about this trip to Arizona, did you
19 have your diary prepared at that point?

20 A Yes.

21 Q And you kept that diary up to date, did you not?

22 A To a certain degree, yes.

23 Q And when were you sentenced to zero to four years?

24 A March 19th, 1976.

25 Q And that was after, now, you testified in the Grand Jury

1 and changed your testimony concerning that trip to
2 Mexico, from Arizona?

3 A Just concerning Miss Boucher.

4 Q Well, before you were sentenced, you had testified
5 to the Grand Jury?

6 A Correct.

7 Q And when you went to the Grand Jury, now, you testified
8 at that time that you did make the trip to Arizona
9 and you brought back Marijuana?

10 A Could you repeat that?

11 Q Of course. When you testified in the Grand Jury --

12 A Okay.

13 Q -- didn't you testify as you told this jury today, that
14 you went out to Arizona, and you had an argument, or
15 whatever it was, with Meg, and she flew back and you
16 drove Marijuana back?

17 A Right.

18 Q Now, that was opposite from that what you told Agent
19 Tripp?

20 A Correct.

21 Q All right now. It was after that, this testimony, that
22 you were sentenced?

23 A Correct.

24 Q And incidentally, when you were being sentenced, or
25 awaiting sentencing, did you ask someone from the

* * *

1 Q Now, I asked you before about these two trips, and
2 the houses that you stayed at, and you told us that
3 you stayed at two different houses: one in January,
4 and one at a subsequent time, and do you recall that?

5 A Yes.

6 Q And you could not remember the inside of either of
7 the two houses?

8 A Right.

9 Q And sir, when you testified in the Grand Jury, were you
10 asked this question, and did you give this answer:

11 'Question: Did you finally arrive in
12 Tucson?'

13 Do you recall that question being asked,
14 sir?

15 A Yes.

16 Q And do you recall giving this answer:

17 'Answer: I arrived in Tucson at a
18 Spanish station. We phoned Kevin at the number I had
19 for him at that time and he dropped out and met me at
20 the station and we followed him back to his house. This
21 is the same house I visited in January.'

22 Do you recall giving that answer, sir?

23 A Yes, I do.

24 Q Now, I ask you again, was it the same house as you
25 testified before the Grand Jury under oath, or was it

1 a different house?

2 A Well, to the best of my knowledge, it was a different
3 house. I must have been incorrect at the Grand Jury.

4 Q Were you incorrect at the Grand Jury? When you testified
5 in the Grand Jury, that was in November of 1975,
6 wasn't it?

7 A Correct.

8 Q And that is one year ago?

9 A Correct.

10 Q And sir, would it be fair to say that your memory was
11 better a year ago concerning the testimony here, or
12 is it better today?

13 A Well, it is just that certain things have come up to
14 mind, you know, and you do a lot of thinking in jail.

15 Q I see.

16 A And I would have to say I was probably wrong in my
17 statement to the Grand Jury.

18 Q In your diary that you started to prepare while you were
19 in jail?

20 A Right.

21 Q And did you make reference to this fact in the diary
22 that there were two separate houses, rather than one?

23 A No, one.

24 Q And that was in your diary that you looked at before
25 going into the Grand Jury?

1 A Correct.

2 Q So, then when did you reflect back and realize that you
3 were wrong about your testimony, and wrong about what
4 you wrote in your diary?

5 A I would say probably in the past two months.

6 Q And was there anything that caused you to direct
7 your attention to whether or not it was one house or
8 two houses?

9 A Yes, it was -- I had a conversation with Miss Boucher
10 and it was sort of mentioned to me that it was not the
11 same house.

12 Q And were you discussing your proposed testimony two
13 months ago with Miss Boucher?

14 A We were not discussing it. We were discussing other
15 things, and it came up about the fact that Kevin and Kris
16 had moved to another house.

17 Q And is it your testimony that while you were talking
18 about other things, she refreshed your recollection
19 or you refreshed your own recollection and realized, then
20 that it was one house, rather than two houses?

21 A Well, the inference came from Miss Boucher that it was
22 two houses.

23 Q And as you sit here now, today is it your testimony,
24 now, that it is two houses?

25 A Yes, sir.

- 1 Q Now, when you spoke to Mr. Tripp, did you tell him
2 that it was two houses, or one house?
- 3 A Well, it would have to be one house one house, I
4 am sorry.
- 5 Q One house?
- 6 A Yes.
- 7 Q And today, when you testified on direct and answered
8 Mr. Dreyer's questions that it was two houses, did you
9 realize, then, that you told something else in the
10 Grand Jury?
- 11 A No, because I have not seen my Grand Jury testimony.
- 12 Q Now, did Mr. Katz ever tell you that he drove out with
13 a Mr. Cohen to Arizona, without anyone knowing it?
- 14 A Yes.
- 15 Q And did he tell you the reasons that he and Cohen
16 drove out to Arizona?
- 17 A Yes.
- 18 Q And was the reason that Mr. Katz went out to Arizona
19 without anyone knowing it, was to purchase or make a
20 contact to purchase Marijuana in Nogales, Mexico?
- 21 A Yes.
- 22 Q And when did Mr. Katz tell that to you?
- 23 A After he had made the trip.
- 24 Q And did he tell you who Mr. Cohen and Mr. Katz went
25 to Arizona to visit?

* * *

1 A Mr. Lombardino.

2 Q And how many times did you call my office?

3 A Two or three times.

4 Q And could it have been six or seven times?

5 A I only remember two or three.

6 Q Did I ever return your call?

7 A Yes.

8 Q And did you speak to me on the telephone?

9 A Well, I don't know if it was you, but I spoke to
10 someone on the telephone.

11 Q And what did that person say?

12 A That he was advising his client that it is advisable
13 to break off communications between me and him.

14 Q Now, did you tell Mr. Cooney that when Meg Boucher
15 went into the Grand Jury and testified, that she lied?

16 A I said that I thought that she had lied, yes.

17 Q And did you -- withdrawn. Did there come a time
18 that you said to Mr. Cooney that you were going
19 to come into Court and tell or testify that what you
20 had said in the Grand Jury was a series of lies?

21 A Yes.

22 Q Did you ask Mr. Cooney, again, for a sum of money
23 to get yourself up in business?

24 A We were discussing it, yes.

25 Q And what did you say to Mr. Cooney?

* * *

1 A Kevin called me.

2 Q And it was he that offered you money?

3 A We were discussing the Indictment.

4 Q Yes, and incidentally, what did you say to him about the
5 Indictment?

6 A I -- we discussed the fact that we were talking about
7 Meg, and Kevin was under the impression that Meg
8 initiated the Indictment.

9 Q And didn't Mr. Cooney tell you that Meg was a liar?

10 A Yes.

11 Q And when he said that, didn't you say to him, 'You don't
12 know how much of a liar'?

13 A I don't recall that, no.

14 Q As a matter of fact, didn't you say that you never
15 realized how much a woman could hurt you?

16 A I said that, yes.

17 Q And didn't you also say to him that at that time, there
18 was a period of time that you did not want to look at
19 another woman again?

20 A Yes.

21 Q And did you also say in that conversation that you
22 have reconfirmed your faith in women since you now
23 have met this lady that you are residing with?

24 A Yes.

25 Q And what did you say about Meg to Mr. Cohen, over the

- 1 telephone?
- 2 A To Mr. Cohen?
- 3 Q I am sorry, Mr. Moscowitz, to Mr. Cooney?
- 4 A Would you repeat that question?
- 5 Q Certainly. When you were talking about Meg to Mr.
- 6 Cooney, via the telephone, and you told him how much
- 7 she had done to hurt you, and you had lost your faith
- 8 in women, what did you say about Meg?
- 9 A I told him that she was a very sly and cautious young
- 10 lady, and that you had to watch out for her.
- 11 Q Did you also say that she was capable of lying?
- 12 A Yes.
- 13 Q And did you also tell Mr. Cooney that in the case at
- 14 hand; of this trial, that she did in fact, lie?
- 15 A No.
- 16 Q Well, did you ever read her Grand Jury minutes?
- 17 A No.
- 18 Q And do you know what she said?
- 19 A No.
- 20 Q And do you know whether she lied or not, then?
- 21 A No.
- 22 Q Now, did you know an individual by the name of Andrew?
- 23 A Andrew?
- 24 Q Yes.
- 25 A Are you referring to Andrew Blossbly?

- 1 A Yes, sir.
- 2 Q Yes.
- 3 A No.
- 4 Q And in your entire life, did you ever meet Andrew Blosbly?
- 5 A No.
- 6 Q And are you sure of that?
- 7 A Yes.
- 8 Q And when for the first time, did you hear the name
- 9 Andrew Blosbly?
- 10 A At Buddy Levy's house out in Crescent.
- 11 Q And did you know, as you sit here now, where he lives?
- 12 A Who, Andrew Blosbly?
- 13 Q Yes.
- 14 A No.
- 15 Q And do you know what Andrew Blosbly looks like?
- 16 A I do now, because I have seen pictures of him.
- 17 Q You saw pictures?
- 18 A Yes.
- 19 Q And do you know how old he is?
- 20 A No.
- 21 Q And do you know if he speaks with an accent? Of any
- 22 sort?
- 23 A No.
- 24 Q And did you ever speak with him?
- 25 A No.

1 Q Did you ever speak to him over a telephone?

2 A No.

3 Q Did you ever meet with him here in the Albany area?

4 A No.

5 Q Did you ever meet with him in New York City?

6 THE COURT: Wait a minute. Did you
7 ever have any contact at all with him?

8 THE WITNESS: No.

9 THE COURT: Any place?

10 THE WITNESS: No.

11 THE COURT: All right.

12 BY MR. LOMBARDINO:

13 Q All right, sir. You remember testifying under oath
14 in the Grand Jury, do you not?

15 A Yes.

16 Q And were you asked this question, and did you give this
17 answer, and do you recall the question that Judge Foley
18 just asked you?

19 A Yes.

20 Q 'Question: At that time, did he mention any names of
21 persons who might be handling those substances?'

22 Do you recall being asked that question?

23 A Yes.

24 Q 'Answer: The only name that came up was a fellow,
25 Andrew Blosbly.'

1 A Yes.

2 Q And do you remember giving that answer?

3 A Yes.

4 Q And:

5 'Question: And how do you spell that?'

6 Do you recall being asked that question?

7 A No.

8 Q 'Answer: I am not sure of the spelling. I had met
9 Andrew Blossby before when I was living in Watervliet,
10 New York.'

11 Were you asked that question, and did
12 you give that answer?

13 A Well, if that is in my Grand Jury testimony, then I
14 did.

15 MR. LOMBARDINO: Mr. Dreyer, would you
16 stipulate that that is what he testified to?

17 MR. DREYER: Yes.

18 THE COURT: All right.

19 BY MR. LOMBARDINO:

20 Q When you responded to Judge Foley that you never saw
21 Mr. Blossby before, did you lie then?

22 A No, because --

23 Q Well, when you testified in the Grand Jury that you met
24 him, did you lie then, or, Mr. Moscovitz, are you a
25 perpetual liar?

1 THE COURT: Wait a minute. You know
2 you don't ask questions like that.

3 THE WITNESS: People do --

4 THE COURT: Wait a minute.

5 MR. LOMBARDINO: I will withdraw it, sir.

6 BY MR. LOMBARDINO:

7 Q When you responded to that --

8 THE COURT: That is like the question,
9 'Have you stopped beating your wife'.

10 MR. LOMBARDINO: I am sorry, I really am.

11 BY MR. LOMBARDINO:

12 Q When you answered Judge Foley, five minutes ago, when
13 he asked you if you ever met Blossbly or had contact
14 with him and you said no?

15 A Right.

16 Q Now, I ask you, did you lie to Judge Foley?

17 A No.

18 Q And when you answered this question in the Grand Jury
19 that you met Andrew Blossbly when you were living,
20 specifically at Watervliet, did you lie then?

21 A No. Would you like me to explain?

22 Q Mr. Moscovitz, I don't want you to explain.

23 THE COURT: Mr. Lombardino, it has been
24 about an hour, now.

25 MR. LOMBARDINO: I know.

* * *

1 A Correct.

2 Q And do you remember telling Mr. Cooney on another
3 occasion, the Indictment is a lie?

4 A No.

5 Q And do you remember telling him that he is innocent and
6 he is not getting a fair shake?

7 A No.

8 Q Do you remember discussing with him the fact that Mr. Katz
9 might testify?

10 A Yes.

11 Q And did you also discuss the fact that you expected
12 that Mr. Katz would give false testimony?

13 A I said I doubted his credibility.

14 Q All right. And that is testimony that could probably
15 be blown apart?

16 A Yes.

17 Q Do you remember discussing -- do you also remember, sir,
18 discussing with Mr. Cooney the fact that it bothered
19 you that nobody was caught actually doing anything in
20 this case? Do you remember that part?

21 A We were discussing that, yes.

22 Q And that the -- do you remember also discussing in
23 that area, that there was no evidence here, except
24 what people were saying; do you remember that?

25 A I remember discusssing that, except for the testimony,

* * *
November, 1972.'

Did you give those answers to the those questions?

A Yes.

Q Well, did you lie to the Grand Jury?

A Not exactly.

Q Did you tell them the truth?

A Yes.

Q Did you lie to this jury?

A No.

Q Well, I will have to leave that for the jury --

MR. DREYER: Objection.

BY MR. LEBETKIN:

Q Now, you also testified that in July of 1972, -- you testified today, sir, that with reference to July of 1972, you went with Sandra Brooks to Harold Levy's house

A Correct.

Q Am I correct?

A Yes.

Q And that was in the first week of July, 1972? Is that correct?

A Correct.

Q And you said that among other things that you said, 'there was a lime-colored car outside'.

THE COURT: You have to answer.

* * *

1 BY MR. LEBETKIN:

2 Q Now, you and Meg testified in this building, before
3 a Grand Jury at about the same time, is that correct?

4 A Correct.

5 Q And you were not in the Grand Jury Room together, I
6 understand that?

7 A Correct.

8 Q And there came a time after you testified that she
9 testified, and then you testified again; your testimony
10 was split, is that correct?

11 A Yes.

12 Q And Meg was living in your house at that time, wasn't
13 she?

14 A Yes.

15 Q And she made notes of what she said, isn't that correct?

16 A Excuse me?

17 Q And she made notes of what she was saying?

18 A To my understanding, yes.

19 Q And didn't you tell Kevin this on the telephone?

20 A That what?

21 Q That Meg lived in your house, and made notes of her
22 testimony before the Grand Jury?

23 A Yes.

24 Q And where is Meg now?

25 A In Florida, I understand.

1 Q And do you know her address?

2 A No.

3 Q And you have attempted to locate her, haven't you?

4 A Not really.

5 Q Well, you told Kevin that she has something that belongs
6 to you?

7 A She has something that belongs to me.

8 Q Some leather tools or something; I don't know?

9 A Correct.

10 Q And that you were trying to find her and you couldn't?

11 A Right.

12 Q And you spoke to Tripp, and you asked him where she is,
13 and he said that they can't locate her, right?

14 A Correct.

15 Q And that she won't be here at the trial, is that correct?

16 A Correct.

17 Q And you also told Kevin, when you were saying this,
18 that she started the whole thing with the testimony?

19 A No.

20 Q You told him that -- I say that you told Kevin that
21 Meg and Jeff were caught, right?

22 A No.

23 Q And that each day Meg was putting her testimony on
24 notes in your house, and you and Meg were deciding how
25 to testify?

1 A No.

2 Q And now she can't be found, is that correct?

3 A Correct.

4 Q And also, when you were telling Kevin about the
5 money, and why you needed it, and why you thought
6 you deserved it, you said to him, 'Remember, I called
7 you first'?

8 A No.

9 Q And when you told the agents that you were looking for
10 Meg before, she had something that belonged to you, and
11 Mr. Tripp said we can't locate her, right?

12 A Correct.

13 Q And did you believe him?

14 A Yes.

15 Q You had no choice? And today, Mr. Dreyer put into
16 evidence a letter, a letter that was written to you by
17 Kris Cooney, is that correct?

18 A Correct.

19 Q And when I say to you, I mean you and Meg who was then
20 with you. And she thanked you, and in addition to
21 sending a gift, she thanked you for the hospitality
22 that you and Meg showed to her, when she was in Albany?

23 A Yes.

24 Q And you referred to this, also, on the phone when you
25 spoke to Kevin, right? And there was nothing wrong

1 with it?

2 A No, I don't -- no.

3 Q You don't. And do you remember telling Kevin that the
4 agents turned it around and they made it a fact that
5 you went out there to drive a load, right after?

6 A No.

7 Q Because in the letter there was something about, 'we
8 will be glad to see you soon'?

9 A No.

10 Q And then you said to Kevin that is not all, and she
11 described the house, also, to the agents which at best
12 wasn't too hard because the agents showed her a picture
13 of it, and then asked her to describe it, isn't that so?
14 A I can't answer that. I don't know.

15 Q And did you also tell Kevin, sir, -- let me ask you
16 something, Mr. Moscowitz: do you think that I am standing
17 here and asking you all of these questions just because
18 I look to pass the time of day?

19 A No.

20 Q Do you think that it is possible that I may have
21 substantial proof of what I am saying to you?
22 A Yes.

23 Q Well, then you continue to answer the questions the
24 way you want to.
25

1 the trip to Denver to say that you went to Arizona,
2 and Mexico with Kevin?

3 A No.

4 Q That you had stated that you had never been in Mexico
5 or Arizona?

6 A No.

7 Q And you told Kevin, 'Kevin, I don't like myself for
8 lying about you and Buddy, but I was up against the
9 wall.' Do you remember saying, 'I don't like myself
10 for lying'?

11 A No.

12 THE COURT: Mr. Lebetkin, with your
13 approach, I think that you better fix a time that you
14 are talking about so that we will know what time you
15 are saying these conversations occurred?

16 MR. LEBETKIN: I absolutely agree with
17 that, and I will do that, Judge, at your instruction.

18 BY MR. LEBETKIN:

19 Q Specifically, as the Judge, directs, on July the 8th,
20 of 1976, sometime around 3:30 in the afternoon
21 I want you to tell this jury and this Court if you had
22 a phone conversation, and I am reminding you that you
23 are under oath, all right? Did you say, 'My wife called
24 with Dena -- well, let's start with that?

25 A Yes.

A No, I don't know exactly --

1 Q Well, did you say , 'I am calling you from New York'?

2 A On July 8th?

3 Q On July 8th, 1976?

4 A I don't know where he was on various days when he
5 called me.

6 Q Isn't it time to get down to the truth --

7 THE COURT: Wait a minute. This is a
8 call from Cooney in New York City? That isn't clear.

9 MR. LEBETKIN: Yes.

10 THE COURT: To this witness in Albany?

11 MR. LEBETKIN: Yes, sir.

12 THE COURT: And the call was initiated
13 by Cooney?

14 MR. LEBETKIN: That is correct, sir.

15 THE COURT: All right.

16 BY MR. LEBETKIN:

17 Q And you are telling this jury under oath that you did not
18 say that on that day, and on that time on that phone?

19 A Yes.

20 Q And you are willing to pay the penalty if you are a liar?

21 A Yes.

22 Q Okay, that is fair enough.

23 And didn't you say, with reference to
24 the Indictment: it was false and the Indictment is
25 no good?

1 A No.

2 Q Okay. Did you say in that continued phone call, at
3 that time, ' You know what could happen to me. They
4 could turn around and say, okay, we will hit him with
5 the case of falsifying the testimony to the Grand Jury,
6 and I could do time for that.' Did you say that?

7 A No.

8 Q You are a brave man. But you are an arrogant man,
9 and I don't feel sorry for you.

10 Did you say, 'Our testimony will not
11 stand up '?

12 A I said they may not stand up.

13 Q I am asking you, sir, and you are the witness, and I
14 am the examiner, 'Our testimony will not stand up'?

15 A No.

16 Q Okay. Did you also talk about Blosbly; Andrew Blosbly?

17 A Yes.

18 Q And did you say with reference to Andrew Blosbly,
19 'This kid Blosbly,' and I am quoting your exact words,
20 'This kid Blosbly, I have never met him in my life'?

21 A No, I don't remember.

22 Q Who is the bigger liar, you or Katz, and I want an
23 answer.

24 MR. DREYER: I object to that.

25 THE COURT: Sustained. You don't have

1 to answer that.

2 MR. LEBETKIN: I will abide by Your Honor's

3 ruling.

4 BY MR. LEBETKIN:

5 Q And with reference to Blossbly, did you say to Kevin,
6 'The agents came to the jail, and they showed me
7 pictures of him'?

8 A Yes.

9 Q And that is when you made the statement, 'This kid
10 Blossbly, I never met him in my life'?

11 A To who?

12 Q To the agent who showed you the pictures?

13 A No.

14 Q And is it a fact that you called Kevin and eventually
15 you got him and asked for the money; right or wrong?

16 A Wrong.

17 Q And did Kevin say to you, 'Paul, I don't want to do
18 anything illegal'?

19 A Kevin did say that, yes.

20 Q And you kept pressing him for the money?

21 THE COURT: Was this the same telephone
22 call?

23 THE WITNESS: No, this was another
24 telephone call that he is talking about.

25 THE COURT: Let's fix the time.

1 MR. LEBETKIN: I believe it was the
2 same one.

3 THE COURT: Is this the same telephone
4 call?

5 THE WITNESS: July 8th?

6 MR. LEBETKIN: Yes, to my belief.

7 MR. LOMBARDINO: Could we have an answer
8 to the last question? We don't have an answer to the
9 last question.

10 THE COURT: Ask another question.

11 BY MR. LEBETKIN:

12 Q The question was, what did he say?

13 THE COURT: He said I don't want to do
14 anything illegal.

15 THE WITNESS: My answer was yes.

16 MR. LEBETKIN: Well -- now, I just want
17 to develop one other thing that I curious about.

18 THE COURT: You are getting near the
19 time that you want to adjourn.

20 MR. LEBETKIN: I promise to finish before
21 4:15 and it is 4:11.

22 BY MR. LEBETKIN:

23 Q I just want to get something straight: the agents
24 developed this case, did they not?

25 A Yes.

1 Q And in part, they developed it through the testimony
2 of Meg, Margaret Boucher or BRucker?

3 A No, Margaret Boucher.

4 Q Thank you. And they developed that, they came to the
5 Saratoga Correctional Institution and visited you?

6 A No.

7 Q Well, correct me, and tell me why not?

8 A They -- well, I wrote a letter to Phil Levy asking them
9 to bail me out of the Saratoga Jail, and when they
10 refused, and I got refused, I got in contact with the
11 State police.

12 Q Now, when did they find out about Meg?

13 A About Meg?

14 Q Right?

15 A They were trying to get in touch with Meg ever since
16 the first time that they came out and talked with me.

17 Q All right. But anyway, they came to you, as a result
18 of you sending for them?

19 A Right.

20 Q And eventually they got together with Meg, also?

21 A She agreed to testify, yes.

22 Q And they went to her?

23 A Yes.

24 Q And then you both got informants' numbers, right?

25 A Correct.

1 Q And then they developed the case, or after they developed
2 it, they brought to your knowledge, they brought the
3 case to Mr. Dreyer?

4 A Correct.

5 Q Mr. Dreyer did not go out in the field and look for the
6 case, and that is not his job?

7 A Right.

8 Q He didn't know anything about the case; they brought the
9 case to him, right?

10 A Right.

11 Q And when they brought the case, they brought along with
12 it the witnesses, like you?

13 A Right.

14 Q And people who said they were telling the truth?

15 A Right.

16 Q And the people who developed the case were the agents,
17 and whether they are telling the truth or not, they
18 came to this building, and spoke to Mr. Dreyer, is
19 that correct?

20 A Correct.

21 Q I just wanted to get it straight. But Mr. Dreyer did
22 not come to you?

23 A No.

24 Q And he ended up prosecuting this case, and you were
25 among others, brought to him, right?

1 A Yes.

2 MR. DREYER: May I ask about the
3 relevancy of this?

4 THE COURT: I don't know if he knows
5 about that anymore than I do. You are asking a lot
6 of things that he wouldn't know about and I don't know
7 about.

8 BY MR. LEBETKIN:

9 Q But when you testified in the Grand Jury and you lied
10 in the Grand Jury, you also lied to him, didn't you?

11 THE COURT: But he doesn't know who puts
12 all of the cases together, and who brought it to the
13 Prosecutor.

14 THE WITNESS: I don't even know.

15 BY MR. LEBETKIN:

16 Q And you never told Mr. Dreyer that you were lying,
17 I am sure of that?

18 A Is it your statement that I lied to the Grand Jury?

19 Q Did you ever tell Mr. Dreyer that you lied?

20 A On one statement, yes.

21 Q On one?

22 A Yes.

23 MR. LEBETKIN: Thank you.

24 THE COURT: Thank you.

25 Mr. Leone, you will be next, when we

* * *

1 A No.

2 Q And from that time that you were released, did you
3 ever possess a hypodermic needle?

4 A From the time I was released?

5 Q Yes.

6 A No.

7 Q Did you ever possess marijuana?

8 A Yes.

9 Q Did you ever possess heroin?

10 A No.

11 Q Cocaine?

12 A No.

13 Q Nitrous oxide?

14 A Nope.

15 Q Would you say, sir, that every date that you testified
16 to in this Court, not only the date, the month and the
17 year, coincides with what is in this story book that
18 you have?

19 A Correct.

20 Q And does it coincide also with the dates, month and
21 year, that you gave agents of the D.E.A.?

22 A Yes.

23 Q Did you ever change your story with the D.E.A.?

24 A Yes.

25 Q How many times?

- 1 A Just once when I had told them that I had lied to them
- 2 Q What was that lie, sir?
- 3 A Regarding Miss Buecher's driving a load of marijuana
- 4 from -- from New Mex-- I mean, from Tucson.
- 5 Q Did you tell them that you discussed your testimony
- 6 before the grand jury with Miss Buecher?
- 7 A No.
- 8 Q Were you present when Miss Buecher was interviewed
- 9 by the agents?
- 10 A No.
- 11 Q Were you present when Miss Buecher testified before
- 12 the grand jury?
- 13 A No.
- 14 Q Were you in this building when Miss Buecher testified?
- 15 A Yes.
- 16 Q Did you bring her over that morning?
- 17 A Yes.
- 18 Q And did you testify immediately after her?
- 19 A Well, first I testified.
- 20 Q Well, I amon, talking about the day she came?
- 21 A Yes.
- 22 Q Now, you know one Paul Camussa?
- 23 A Yes.
- 24 Q You are familiar with prescription forms, is that
- 25 correct?

1 A To a certain degree, yes.

2 Q Was Mr. Camussa familiar with prescription forms?

3 A Yes.

4 Q Did Mr. Camussa ever fill out a prescription form for
5 you so that you may obtain illegal drugs?

6 A No.

7 Q Did you ever see Mr. Camussa do that?

8 A No.

9 Q Did you ever ask Mr. Camussa how to do it?

10 A No.

11 MR. DREYER: I object to this line of
12 testimony at this point.

13 THE COURT: What ground? I cannot
14 hear.

15 MR. DREYER: I am objecting on the
16 grounds that the defense attorney is using extrinsic
17 evidence to prove what Mr. Camussa has already
18 testified to. It is not admissible.

19 THE COURT: All right, sustained.

20 BY MR. LEONE:

21 Q Now, do you have an opportunity to make telephone calls
22 from where you are now living, yes or no?

23 A You mean the jail?

24 Q The jail.

25 A Yes.

1 Q And this story book you have, where is that presently?

2 A It is being stored in Troy, New York, with the rest
3 of my belongings.

4 Q Who is storing it?

5 A My parents.

6 Q Have you had occasion to discuss with your parents the
7 contents of this book?

8 A No. I tried to get it before I came here, but I was
9 unable to.

10 Q Well, did you ask anybody to read it to you over the
11 telephone?

12 A No.

13 Q How long were you and Miss Buecher together?

14 MR. DREYER: Can we lay a foundation
15 for that as to what period of time we are talking
16 about?

17 BY MR. LEONE:

18 Q When did you meet Miss Buecher?

19 A April of 1973.

20 Q When did you start living with Miss Buecher?

21 A At the end of April 1973.

22 Q When did Miss Buecher leave you or you leave Miss
23 Buecher?

24 A After she turned me in in December of 1974.

25 Q And is that the time that you decided to have

1 Miss Buecher indicted?

2 A No.

3 Q When did you decide to have Miss Buecher indicted?

4 A In September -- well, about September of 1975.

5 Q And what did you do in order to have Miss Buecher
6 indicted -- withdrawn. Did you go to the D.E.A. and
7 tell the D.E.A. that, "I want to indict Miss Buecher"?

8 A No.

9 Q How did you do it?

10 A I put in the fact that she had driven a load.

11 Q And that load that you said that she drove, the weight
12 was approximately 300 pounds, is that correct?

13 A Between three and four hundred pounds, right.

14 Q Did you tell Miss Buecher you did that?

15 A Yes.

16 Q So it is your testimony, then you deliberately lied
17 to place somebody under indictment, is that correct?

18 A Correct.

19 MR. LEONE: I have no further
20 questions, your Honor.

21 CROSS-EXAMINATION (continued)

22 BY MR. RYAN:

23 Q Since you testified here last Friday, Mr. Moscowitz,
24 have you had occasion to talk to anyone from the jail?

25 A Excuse me?

1 Q Since you testified here Friday, have you had occasion
2 to talk to anyone from the jail?

3 A No.

4 Q Did you make any telephone calls?

5 A No.

6 Q Did you receive any telephone calls or any other type
7 of communication?

8 A Just from the chaplain.

9 Q Now, did I understand you to say that you falsely
10 accused Meg of driving marijuana from Arizona to
11 Albany?

12 A Correct.

13 Q And you told that to the D.E.A. agents, isn't that
14 right?

15 A Correct.

16 Q And that was told to them in the initial meetings
17 that you had with the agents, right?

18 A Right.

19 Q We know that you were arrested on December 23, 1974
20 for possession of cocaine. Do you recall that?

21 A Yes.

22 Q In May, did you live at 8 Saratoga Road in Clifton
23 Park?

24 A 8 Stony Brook Drive.

25 Q I am sorry, 8 Stony Brook Drive, it was your house?

* * *

1 Q Did you ever talk to Tripp or anyone in Law Enforce-
2 ment, at the time you appeared before the grand jury,
3 about the possibility of Paul Camussa cooperating?

4 A Mr. Tripp -- oh, no.

5 Q Well, did Mr. Tripp ask you about the possibility
6 of Paul Camussa cooperating?

7 A Yes.

8 Q And did he say, in words or substance, "Can you get
9 your friend Paul to help us out on the case?"

10 A I told him I thought that was impossible.

11 Q Now, you have testified here that before the agents
12 at the interviews, and I believe before the grand jury,
13 you falsely accused Meg. of driving marijuana from
14 Arizona to Albany, right?

15 A Yes.

16 Q And at the time you appeared before the grand jury,
17 the differences that you previously had with her had
18 been resolved, had they not?

19 A Not exactly, no.

20 Q Well, you and Meg came to this Courthouse on the same
21 day that you both testified before the grand jury?

22 A Yes.

23 Q And you drove the car?

24 A Yes.

25 Q And you were on talking terms with her?

1 A Yes.

2 Q And did you tell Meg that you falsely accused her of
3 driving marijuana from Arizona --

4 A No.

5 Q -- to Albany? And was your purpose in making that
6 false accusation to hurt Meg or to help the credibil-
7 ity of your story?

8 A To hurt Meg.

9 Q With respect to your grand jury testimony, did you
10 ever tell anyone that your testimony in the grand jury
11 was a lie, it was false and the indictment was no
12 good?

13 A Yes.

14 Q And of course Meg was granted some kind of immunity
15 from anything she testified about in the grand jury,
16 correct?

17 A Correct.

18 Q That is your understanding, right?

19 A Yes.

20 Q And did you learn that Paul Camassa obtained immunity
21 from anything he might say in the grand jury?

22 A No, I just found out recently that he testified.

23 Q Now, after you testified in the grand jury, the
24 indictment was returned on February 2, 1976, and you
25 had to appear in the State case before Judge Klein on

*Clyde
spelt*

1 March 6, about a month later. Do you recall that?

2 A Yes, I do.

3 Q And now you were at the point where you had to decide
4 whether to plead guilty or to go to trial in the
5 State case, right?

6 A Right.

7 Q did you talk to Mike Elliott prior to making the
8 decision before March 6, 1976?

9 A Yes.

10 Q Did you talk to Agent Tripp prior to making your
11 decision for May 6, 1976?

12 A Yes.

13 Q And did you talk to Mr. Dreyer?

14 A Yes.

15 Q And what did you tell Mike Elliot concerning your
16 May 6 appearance?

17 A That I wanted five years' probation.

18 Q And what did you tell Agent Tripp?

19 A The same.

20 Q What did you tell Mr. Dreyer?

21 A The same.

22 Q And, of course, you had a lawyer representing you --

23 A Yes.

24 Q -- on March 6 when you appeared before Judge Clyne,
25 correct?

1 A Yes.

2 Q And you pled guilty to a cahрге of possessing cocaine,
3 punishable up to seven years in prison?

4 A Correct.

5 Q Did Agent Tripp tell you that in connection with your
6 sentencing on your plea of guilty that the Drug
7 Enforcement Agency would write a letter on your
8 behalf?

9 A No.

10 Q Did AGent Tripp indicate that the Drug Enforcement
11 Agency dould do something to try to help you for your
12 sentence?

13 A Yes.

14 Q Did he tell you what he would try to do for you?

15 A Not exactly, no.

16 Q It is true, is it not, that when you pled guilty on
17 March 6, 1976, one of the substantial reasons in your
18 mind was that you believed the Drug Enforcement
19 Agency would do what it could to help you on your
20 sentencing?

21 A Absolutely.

22 THE COURT: Who was your lawyer at
23 that time?

24 THE WITNESS: Rosenblum & Leventhal.

25 THE COURT: Which one?

* * *

1 Q You instructed your lawyer to file an appeal, correct?

2 A Yes.

3 Q And one of the reasons you told your lawyer it was
4 unduly harsh is that you had been rehabilitated;
5 correct?

6 A Yes.

7 Q And your lawyer represented that to the court in the
8 court papers, did he not?

9 A I understand so, yes.

10 Q And while you were pursuing the appeal through your
11 lawyer, did you say to anyone that, "For a sum of
12 money I will not appear as a witness in the Federal
13 case"?

14 A Yes.

15 Q And while your appeal was pending, did you say to
16 anyone that, "For a sum of money I will change my
17 testimony"?

18 A Yes.

19 Q And while your appeal was pending, did you falsely
20 make a prescription with intent to defraud and deceive
21 the Delmar Pharmacy by writing it under the name of a
22 Dr. Lee R. Lubkin?

23 A I think I --

24 MR. DREYER: I object on the ground
25 that Mr. Moscovitz -- well --

* * *

1 concerning his bringing loads back, did he tell you
2 that he got loads from any place else other than
3 Nogales?

4 A Yes, that he drove for Kevin.

5 Q Did he tell you how many times he drove for Kevin?

6 A No, he just mentioned that he had driven numerous
7 times.

8 Q Did he tell you that he had also gone to California?

9 A Yes.

10 Q He did not say he drove for Kevin, then, did he?

11 A No.

12 Q Did he tell you that he brought back marijuana from
13 California?

14 A Yes.

15 Q Mr. Lombardino asked you on direct examination --
16 strike that, cross-examination, whether you had
17 testified before the grand jury that you had met
18 Andrew Blossy in Watervliet, New York?

19 A Yes.

20 Q Did you meet Andrew Blossy in Watervliet, New York?

21 A No.

22 Q Did you meet someone in Watervliet, New York?

23 A Yes, it was the name Andrew, and I thought that was
24 Andrew Blossy.

25 Q And when you testified at the grand jury, that is what

1 you meant?

2 A Yes.

3 MR. LOMBARDINO: Your Honor, I object
4 now. That is improper. He already testified concern-
5 ing Blossy. I think it is the jury's --

6 MR. DREYER: We will move to --

7 MR. LOMBARDINO: May I please finish
8 my objection? I think it is the jury's province to
9 determine the truth or the falsity of what this witness
10 is testifying. And I do not think he should be given
11 the opportunity to tell this jury now why he said one
12 thing in the grand jury --

13 THE COURT: All right. What he meant
14 is that what --

15 MR. DREYER: I am withdrawing that
16 question.

17 THE COURT: All right. I sustain
18 the objection.

19 MR. LOMBARDINO: Thank you, sir.

20 BY MR. DREYER:

21 Q Did you ever hear the name Andrew Blossy?

22 A Yes.

23 Q Did you hear it for the first time from Mr. Tripp?

24 A No.

25 Q Where for the first time did you hear the name Andrew

- 1 Blossy?
- 2 A In May of 1974.
- 3 Q Where did you hear it?
- 4 A At Buddy Levy's house in Crescent.
- 5 Q All right. Under what circumstances did you hear it?
- 6 A Meg, Miss Buecher and myself were out at Buddy's house
- 7 and we had heard that there was some trouble
- 8 regarding some money that was picked up in New Mexico.
- 9 Q To the best of your recollection, that was May, is
- 10 that correct?
- 11 A Right.
- 12 Q Okay. Who told you about that?
- 13 A Mr. Levy.
- 14 Q And what kind of trouble did he tell you about?
- 15 A He didn't go into detail.
- 16 Q Did he specifically say who Andrew Blossy was?
- 17 A No, just that he had driven the money across the
- 18 country.
- 19 Q And then what happened?
- 20 A That he got stopped in New Mexico.
- 21 Q And that was the first time you heard the name Andrew
- 22 Blossy --
- 23 A Right.
- 24 Q -- to the best of your recollection?
- 25 A Yes.

* * *

1 Q Okay. Did you also tell Agent Tripp that Andrew
2 Blossy was driving back marijuana from Tucson, Arizona
3 from which he was purchasing it from Kevin Cooney?
4 Did you also tell that to Agent Tripp?

5 A Yes.

6 Q And wasn't that a lie, Mr. Moscowitz?

7 A Because, as I repeated, I thought it was a different
8 Andrew.

9 Q Well, at that meeting, again you spoke and you heard
10 the name Andrew Blossy, you knew then you did not know
11 an Andrew Blossy, didn't you?

12 A In many -- many of the people that I knew, I only knew
13 them by first names.

14 Q And so you went ahead and told Agent Tripp that
15 Andrew Blossy was also bringing back marijuana from
16 Kevin Cooney?

17 A Yes.

18 Q And now today you know that is not true, don't you,
19 Mr. Moscowitz?

20 A Yes.

21 Q Now, is it your testimony that Mr. Cooney first called
22 you in regard to offering you money?

23 A Yes.

24 Q Now, on Friday I asked you whether or not you ever told
25 Kevin Cooney that the reason you wanted this money was

1 because your daughter was going through a critical
2 operation. As a matter of fact, I asked you on Friday
3 if you told Kevin Cooney that she died and you said
4 you did not. Do you remember that?

5 A Yes.

6 Q Now, I am going to ask you, after you had time over
7 the weekend and after speaking to Mr. Dreyer, did you
8 tell Kevin Cooney that your daughter died and you had
9 to bury her?

10 A Yes.

11 Q Now, you remember that over the weekend, don't you?

12 A Yes.

13 Q So that when you told this jury Friday that you never
14 told Cooney that that nine-year-old girl who was
15 living, thank God, and going to school, when you told
16 that jury Friday that you never told that to Cooney,
17 you were lying as you sat there sitting next to
18 Judge Foley under oath testifying to this jury?

19 A Yes.

20 Q Did your conscience bother you over the weekend to
21 think that you used your daughter to try to get money
22 and the fact that this nine-year-old child was dead,
23 did it bother you, Mr. Moscowitz?

24 MR. DREYER: Objection, your Honor.

25

1 BY MR. LOMBARDINO:

2 A No, I had a talk with the chaplain.

3 THE COURT: He has answered, he has
4 answered.

5 BY MR. LOMBARDINO:

6 Q You spoke to a chaplain?

7 A Yes.

8 Q Did you tell the chaplain how many times you lied in
9 this case?

10 A I told him about the conversation.

11 Q Did you tell the chaplain that you decided that you
12 wanted to indict Meg so therefore you lied in the grand
13 jury?

14 MR. DREYER: Your Honor, Mr.
15 Moscovitz may not know that he does not have to tell
16 us what he spoke to the chaplain about.

17 BY MR. LOMBARDINO:

18 Q Withdraw the question. Mr. Moscovitz, I do not want
19 to know what you told the chaplain. By the way, you
20 use the name Aaron David, don't you?

21 A Yep.

22 Q And you say that because you have had so many conflicts
23 with the law that you have to use another name to get
24 a job and hold it?

25 A Correct.

1 Q And would it be fair to say to us that when your
2 employers find out that you are a drug peddler you get
3 fired?

4 A I wasn't -- correct.

5 Q Okay. And this Aaron David, this was also the name
6 that you used to get the money from Cooney, isn't it?

7 A Correct.

8 Q As a matter of fact, you said to Kevin Cooney, "Make
9 out a check to Dr. Aaron David"?

10 A Correct.

11 Q Now, do you remember telling us Friday, when I asked
12 you the question, that that did not happen?

13 A Correct.

14 Q Friday when you told this jury that you did not ask
15 Cooney to make out a check to Dr. Aaron David and to
16 send it to your home? You lied to this jury, didn't
17 you, Mr. Moscovitz?

18 A Yes.

19 Q When you told Mr. Cooney to make out the check to
20 Dr. Aaron David, what address did you give him?

21 A I asked him to send it to me.

22 Q Did Cooney ever send you one penny?

23 A No.

24 Q As a matter of fact, Kevin Cooney told you that he
25 would not do anything illegally, didn't he?

* * *

1 July of '76, did you mention the name Katz to him?

2 A We talked about Katz, yes.

3 Q And do you remember -- withdrawn. Did you say to
4 Mr. Cooney, "You guys are not going to get a fair
5 shake"?

6 A I recall talking about his credibility. I don't
7 remember that specific statement.

8 Q Did you say the way they are handling things ---
9 meaning the Government -- the way they are handling
10 things, you found out that Katz's testimony could be
11 blown apart?

12 A Yes.

13 Q And that his whole credibility, that is, Katz's
14 credibility, is bad?

15 A Correct.

16 Q And you were talking about Katz's testimony in this
17 case, not knowing that he was a witness, is that what
18 you are saying?

19 A I knew that they had been looking for Mr. Katz and I
20 knew that he was a possible witness in the case, yes.

21 Q But that is not what you said to Mr. Dreyer on direct
22 examination, did you?

23 A Would you repeat what you just said?

24 Q I said that is not what you told Mr. Dreyer on direct
25 examination?

* * *

1 THE COURT: Will that work out? All
2 right.

3 MR. DREYER: Yes.

4 THE COURT: All right.

5 So I am ready to take our luncheon
6 recess. Have we all finished now, at least with this
7 witness for the time being?

8 MR. DREYER: Yes.

9 MR. LOMBARDINO: Yes, I believe we
10 are, your Honor.

11 THE COURT: All right. Ladies and
12 gentlemen, we will take our lunch. Remember my
13 instructions. We will start again at quarter to
14 2:00, 1:45.

15 (A luncheon recess was taken).

16 (Trial resumes).

17 (Jury enters Courtroom).

18 THE COURT: Call your witness.

19 MR. DREYER: Your Honor, the defense
20 requests a side Bar.

21 (The following was an on-the-record
22 discussion at bench).

23 MR. LEBETKIN: Judge, we understand
24 now that the next witness is going to be the Sergeant
25 Tripeer. That is his name?

1 MR. DREYER: Yes.

2 MR. LEBETKIN: We were notified
3 sometime during the trial that Mr. Trapeer would be
4 a witness and he would be one of the witnesses to
5 testify to what -- to an alleged incident which took
6 place in the State of New Mexico, and that I guess
7 there will then be a Sergeant Montagne who was a
8 D.E.A. agent, Sergeant Ring--

9 MR. DREYER: Sergeant Ring.

10 MR. LEBETKIN: --from the New Mexico
11 police, and there will be testimony about stopping an
12 automobile driven by one Andrew Blossy in an automobile
13 and searching the car and finding \$25,450, two garment
14 bags with some residue of marijuana, an air shock
15 absorber, maybe one or two other items.

16 Since the Government intends to do
17 that, we were notified of that during the trial. We
18 are now requesting that we have a hearing outside the
19 presence of the jury with respect to the search of
20 that automobile, and the alleged acts and statements
21 flowing therefrom which, if the search was illegal,
22 would be the fruits of the poison tree, and I have with
23 me a brief prepared on that matter which I now hand
24 to the Court. It is the defendant's memorandum of
25 law. I am handing that up to his Honor, Judge Foley,

1 a copy to Mr. Dreyer for the Government, and we feel
2 that that, of course, should come at this juncture
3 before any testimony is offered as to the incident.

4 MR. LOMBARDINO: Your Honor, as Mr.
5 Lebetkin said, we are taking the position that
6 certainly my client, the defendant Cooney, and Mr. Levy,
7 as a matter of fact all of the defendants here, have
8 standing to question and to have the Government
9 show that the search and seizure that took place in the
10 State of New Mexico, which the Government is intending
11 to offer in this case, was done within the boundary
12 set forth in the Constitution in that there was not
13 an unlawful search and seizure. In addition thereto,
14 it is quite clear from the agents' reports that there
15 is going to be a statement offered, whether believed or
16 not, by Officer or Special Agent Montagne as to
17 statements made by him, by one Andrew Blossy, who is
18 not in court, but who testified before a grand jury.

19 We take the position, your Honor,
20 that those statements and support I respectfully submit
21 by our brief, we take the position that those state-
22 ments, even if believed, are not the type of statements
23 that should be admitted as a statement of a co-
24 conspirator in the furtherance of a conspiracy.

25 MR. LEBETKIN: Of this conspiracy?

1 MR. LOMBARDINO: Or of any
2 conspiracy. It is quite clear from the grand jury
3 testimony and from the record, that Mr. Blossy, we
4 know, other -- as a matter of fact, he states under
5 oath he did not know the reason for his venture.
6 Therefore you know that those statements are merely,
7 if believed, a statement made by a Law Enforcement
8 officer, period. It does not fall within the purview
9 of a statement made in furtherance of a conspiracy.

10 So the purpose of the hearing, your
11 Honor, is twofold. First, to determine or have the
12 Court determine whether or not there was such
13 intrusion and/or invasion of any of the Constitutional
14 rights of the defendants vis-a-vis the search that
15 took place in regard to that car. In addition there-
16 to, it will give us an opportunity, your Honor, to
17 air out so that your Honor can consider and determine
18 whether or not the statement of Agent Montagne
19 concerning a witness who testified from the grand
20 jury and who is not here, is in fact the type of
21 statement that is permissible under the law pertaining
22 to conspiracy.

23 MR. LEBETKIN: There apparently is
24 the theory of the Government that Kevin Cooney had a
25 proprietary or possessor's interest in the \$25,000 in

1 the automobile, and so that the Government -- if the
2 Government has that theory, then they have given him,
3 by their theory, the standing to proceed with this
4 motion and the hearing to express that evidence.

5 If the Government contends that he
6 does have that interest, then the Government,
7 incidentally, should not offer the evidence. Either
8 it would have to be one or the other.

9 THE COURT: Well, the only comments
10 I make, it is quite late in the day to have this type
11 of change. Ordinarily it is made by some motion.

12 MR. LEBETKIN: We were not
13 notified before the trial, Judge.

14 This information was given to us
15 given to us during the trial and the Government has
16 not been prejudiced or harmed, nor will they
17 have to change strategies and they have not offered
18 any witness yet.

19 THE COURT: I am not in a position to
20 rule, you -- not with inside bench conference in open
21 court with the jury here present, a nine-page brief,
22 I haven't got time to read it and decide the questions,
23 it does run through my mind I notice your first
24 question is standing.

25 MR. LOMBARDINO: Yes.

1 THE COURT: That sticks out like a
2 sore thumb to me, but I do not know, do you have
3 anything else to go on with so we could fill out the
4 jury's time and then hear this?

5 MR. DREYER: No, because the rest of
6 the witnesses in this case will concern the seizure
7 of the \$25,000 and the proposed --

8 THE COURT: I cannot hear you.

9 MR. DREYER: The rest of the witnesses
10 in the case for today and tomorrow will be witnesses
11 who will testify as to the delivery of the money to
12 Kevin Cooney, but frankly, your Honor, I think we
13 can dispose of this in a short period of time if we
14 can have the hearing of arguments on it and then
15 reconvene without having the jury go home today.

16 MR. LEBETKIN: It would not take
17 that long.

18 MR. DREYER: I think there are two
19 things we should delineate for the record. The
20 Government does not intend to offer statements of
21 Andrew Blossy through Sergeant Trapeer or through
22 Agent Montagne. We do not -- in other words, we
23 intend to elicit a chain of events.

24 MR. LEBETKIN: You are offering a
25 statement by Montagne?

1 MR. DREYER: We are offering a
2 statement of Montagne.

3 MR. LOMBARDINO: That is the fruits
4 of the poison tree, it is our contention.

5 MR. DREYER: We are going to get to
6 that, we are offering statements that Mr. Cooney
7 allegedly made to Sergeant Montagne so there won't be
8 any statements from Andrew Blossy which will eliminate
9 the last point in the brief.

10 The main question that I see that we
11 should discuss is, A, whether these defendants have
12 standing to challenge the search of the automobile,
13 B, if they do, whether the search was lawful, and
14 3, whether or not the incident in New Mexico was part
15 of this conspiracy or part of a separate conspiracy.

16 MR. LOMBARDINO: We agree.

17 MR. DREYER: If we satisfy the
18 court that this incident in New Mexico was part of
19 the overall conspiracy, and that the search of the
20 automobile was done properly, and that these defendants
21 do have standing, first we have to get over this
22 threshold problem of standing, then I think we can
23 proceed.

24 MR. LEBETKIN: Both sides agree.

25 MR. RYAN: Can't we do this quite
fast?

1 MR. DREYER: This won't take long,
2 your Honor.

3 THE COURT: But how long? I better
4 excuse this jury.

5 MR. DREYER: Not for the day.

6 THE COURT: Is it your recommendation
7 we hold them, then?

8 MR. DREYER: That is your
9 recommendation?

10 MR. RYAN: Yes.

11 THE COURT: All right.

12 (Back in open Court).

13 THE COURT: Ladies and gentlemen,
14 we had a legal problem. They arise often during
15 trials, particular one that is a long trial. The
16 attorneys and I have decided we want you present here,
17 at least for this afternoon, because we do hope to
18 start testimony again. But there is a need for some
19 discussion and testimony outside of your presence, so
20 I am going to ask you, I am sorry about the in-
21 convenience, if I knew this question was going to come
22 up I would not have brought you back in the Courtroom.
23 I am frank to say that I am going to dismiss you again
24 from the Courtroom until we call you back in again for
25 your services.

1 (Jury leaves Courtroom).

2 THE COURT: I think we will have a
3 recess, 10 minutes. I want to read this memorandum
4 that was just given to me. We will put that on the
5 record.

6 (Recess).

7 (Jury not present).

8 THE COURT: All right. Mr. Lebetkin,
9 you can speak up now, the jurors are not here. And I
10 wondered about timeliness of your application here.
11 I read your brief that was just given to me, and
12 didn't you have any notice that Andrew Blossy was going
13 to be called as a witness?

14 MR. LEBETKIN: Sometime during the
15 trial we were given Andrew Blossy's grand jury
16 testimony, Judge. And we also were informed by Mr.
17 Dreyer, when he gave a list of witnesses in this case.
18 I believe that Andrew Blossy was one of the witnesses
19 he mentioned in his opening statement and said he
20 hopes to offer Andrew Blossy's testimony. I believe
21 that is an accurate quote.

22 THE COURT: Well, that is what I mean.
23 You were put on some notice, weren't you, about the
24 type of testimony that might be given regarding this
25 New Mexico incident?

1 MR. LEBETKIN: During the trial, we
2 were put on notice, that is correct.

3 THE COURT: But didn't you have
4 material furnished before about it, the D.E.A.
5 agents' report? I do not know whether you did or not.

6 MR. LEBETKIN: I never had any
7 material like that, did you?

8 MR. LEBETKIN: That material was
9 given to us during the trial, Judge.

10 THE COURT: Well, I want to ask Mr.
11 Dreyer, have you had time now? Because I have a brief
12 here with cases and, of course, I have had enough
13 experience to run into standing problems and
14 consent problems. What is your position, now, legally,
15 before we hear witnesses?

16 MR. DREYER: Well, first of all,
17 breaking this up into three categories, two
18 categories --

19 THE COURT: Speak up, please.

20 MR. DREYER: The question first is
21 whether or not the defendants in this case have
22 standing.

23 THE COURT: That is a very important --

24 MR. DREYER: That is the first issue.
25 Now, in this particular case, the facts will show, by

1 way of an offer of proof, that on or about
2 September 27, 1974, Andrew Blossy was stopped in New
3 Mexico. The police officer in that area of New
4 Mexico stopped the man for speeding. After he stopped
5 him for speeding, he saw air shock absorbers in the
6 back seat of the automobile in plain view, and he
7 walked around the automobile. He then asked Mr.
8 Blossy for consent to search, and when Mr. Blossy
9 replied that he had no objection to the search of the
10 automobile, Officer Trapeer opened the trunk, found
11 two garment bags and inside one of the garment bags,
12 a residue of marijuana and \$25,000.

13 Now, at the time of the indictment,
14 or when the indictment was returned in this case,
15 Mr. Cooney and others were charged with conspiracy
16 to distribute. The first case cited in the brief of
17 the defendants in this case is Jones against the
18 United States. Now, we think we found a sufficient
19 number of cases which show that in this particular
20 case, because of the nature of the conspiracy charge
21 and because possession of marijuana or possession was
22 not charged, that Mr. Cooney and others have no
23 standing to attack the legality of that search.

24 Now, I am not quite sure what the
25 theory of the defense is. It appears from the brief

1 that the defense has asserted two grounds on which to
2 attack the search, A, that Mr. Cooney has alleged
3 ownership of the money found in the car or that he
4 has some derivative standing to attack the search of
5 the automobile because of the fact that the Government
6 is now trying to prove that there was a connection
7 between the money in Andrew Bloddy's car and Kevin
8 Cooney.

9 But nevertheless, in this particular
10 case, since we are going to prove that connection the
11 defendants have brought to the attention of the Court,
12 it could be a case in which the Court -- well, the
13 case is before the Court, of course, but in response
14 to that, we would point out that in precisely the same
15 situation as we have here in the Sandegas case,
16 which is out of the New York Circuit Court of Appeals
17 in 1970, and I have a brief for that where individuals
18 in a trial were charged with conspiracy, and a
19 co-conspirator was found coming across the Mexican
20 border with a quantity of marijuana in his automobile
21 where the defendants, who were passengers
22 in the car claimed no possessory interest in that car,
23 marijuana is found in that automobile as a result of
24 search, which was then used against the other
25 defendants at trial and lawfully seized from an

1 automobile were not the subject of a suppression
2 hearing because those defendants had no standing,
3 and it is precisely the situation we have here.

4 THE COURT: What was the title of
5 that case?

6 MR. DREYER: Sandegas. I will give
7 you the citation of that. The importance of the
8 Sandegas case is that it interprets and distinguishes
9 Jones, in this particular type of situation, and in
10 this particular type of situation, Jones is the
11 critical case, in my view, because it is in Jones
12 where the distinction between possessory interest
13 and derivative possessory interest is discussed,
14 so I will cite that to the Court now. This is, by
15 the way, the 9th Circuit Court of Appeals and is
16 found at 428, F2d, 1040. And certiority was denied
17 in the same year at 91 Supreme Court 127 and 400 U.S.
18 879.

19 THE COURT: What is the title again?

20 MR. DREYER: Sandegas, S_A_N_D_E_G_A.
21 Specifically, we have some other case we would like
22 to cite, Alderman against the United States, which
23 is found at 89 Supreme Court Reporter 961. We would
24 like to cite for the Court the case of the United
25 States against Graham, 391, F2d, 439(A)6.

1 This Circuit case in 1968, which stands for the
2 proposition that a person who contests the search of
3 an automobile when the search was made away from that
4 person, has no standing to set up the illegal
5 invasion of that automobile. Of course there are many
6 cases cited in that particular case.

7 THE COURT: There are numerous cases?

8 MR. DREYER: Yes.

9 THE COURT: I wonder, is your position
10 that we do not need an evidentiary hearing on the
11 question of standing, Mr. Dreyer?

12 MR. DREYER: No, we do not need an
13 evidentiary hearing on the issue of standing. How-
14 ever, if the Court finds standing, then the next
15 question would be whether or not Officer Trapper
16 conducted a proper search.

17 THE COURT: By consent?

18 MR. DREYER: By consent.

19 THE COURT: Of course that is a
20 factual proposition?

21 MR. DREYER: That is correct.

22 THE COURT: I mean, you cannot expect
23 any rule immediately, can you? I do not know.

24 MR. DREYER: May I have a moment? I
25 do not need a moment, I want to get to one other point

1 before I sit down, because I think it is part of the
2 defense contention as raised by their brief, and that is
3 the question of whether or not this entire incident
4 is within the conspiracy that we are discussing.
5 And I might as well say that now, because the Court
6 is going to have to deal with that in the overall
7 picture: The defense theory is that the incident
8 which occurred in New Mexico and the evidence
9 developed as a result of that incident is part of the
10 same conspiracy.

11 We would state to the Court that in
12 charging a group of persons with conspiracy, it is
13 well recognized that certain co-conspirators need not
14 know the identity or the activities or overt act of
15 others conspirators.

16 THE COURT: That is settled law.

17 MR. DREYER: Yes, Your Honor.

18 Just as long as they know the scope of
19 the conspiracy, in this case we have had testimony
20 from Robert Roth who testified that in August 1973,
21 when he was at the home of Kevin Cooney, Kevin Cooney
22 told him that the scope of the operations was not only
23 the Midwest, but Ithica, Elmira and Binghamton.

24 Number 2, William Katz testified
25 that sometime in the fall of 1974, Harold Levy, Harold

1 Levy, Jr., the defendant in this case, told him that
2 he had sustained a loss, told him that he had
3 sustained a loss from the incident in New Mexico.
4 Whether or not that was true or not, the point is,
5 Harold Levy was aware of the scope of that operation
6 also and said to Mr. Katz that he sustained a heavy
7 loss.

8 3. Paul Camussa testified that in
9 the fall of 1974 he approached Mr. Paul Moscovitz in
10 order to ask Mr. Moscovitz to put him in touch with
11 the Arizona connection, Mr. Moscovitz said that he
12 knew Mr. Cooney and that he would try to get him in
13 touch with Mr. Cooney or try to get a -- make arrange-
14 ments with Mr. Cooney. Mr. Camussa testified that
15 some weeks later, he called Mr. Moscovitz and
16 Moscovitz advised him, Camussa, that he could not
17 set up the arrangements because there had been some
18 trouble in Texas involving \$35,000. And that is
19 Mr. Camussa's testimony, but what we allege is that
20 Mr. Camussa was really referring to the incident which
21 actually occurred in New Mexico, the point being that
22 the scope of the operation is made known to the other
23 co-conspirators throughout this entire case, therefore
24 all of these co-conspirators were put on notice as to
25 the scope of the operation and therefore this incident

1 falls clearly within the McChemy Doctrine which
2 recited their liability, the McChemy Doctrine
3 siting multiple conspiracies.

4 THE COURT: Here they raise two questions,
5 first the search itself. We have standing and consent
6 and of course consent necessitates a hearing.

7 MR. DREYER: That is correct.

8 THE COURT: The second one is
9 alleged declarations that were made by Blossy, as I
10 read the brief. Defendants here, attorneys Lebetkin
11 and Lombardino, the in-- do you intend to pursue
12 that?

13 MR. DREYER: I intend to offer no
14 statements from Andrew Blossy, just a chain of events
15 and I intend to elicit certain information from the
16 police officers about what they did with Andrew
17 Blossy, what they received from him, what they saw,
18 et cetera, but at no time do I intend to get into an
19 actual discussion of what Mr. Blossy told the police
20 officers.

21 THE COURT: So doesn't that answer
22 that challenge that they have?

23 MR. DREYER: Yes.

24 THE COURT: Mr. Lebetkin?

25 MR. LEBETKIN: Yes, Judge.

1 MR. DREYER: With regard to Rule 41,
2 your Honor, I really point out that the information
3 provided to the defendants in this case was given, I
4 believe, to them on the evening of November 30, which
5 was one day before trial, and in that package of
6 information that we gave to them, we gave them the
7 testimony of Andrew Blossy, and we gave them the
8 testimony of Agent Montagne.

9 I believe in that particular package,
10 we also gave them the New Mexico State police report
11 in which Agent Trapeer or rather Sergeant Trapeer,
12 who is the next witness, outlined his stopping a Mr.
13 Blossy and the search of the automobile. Moreover,
14 and I believe Mr. Lombardino will bear me out,
15 although I cannot precisely recall positively, I am
16 somewhat sure that I gave Mr. Lombardino, during the
17 summer of this year, an outline of conversation between
18 Mr. Montagne and Mr. Cooney, a transcript taken from
19 the testimony of Agent Montagne at the grand jury.
20 And in that conversation, it is clear that Mr. Montagne
21 is talking about money seized and what he wants Mr.
22 Cooney to do with the money, so far as notice is
23 concerned and the requirements of Rule 41, we believe
24 the defense has been put on notice so that this
25 incident did not have to occur today just prior to the

1 witness being called.

2 THE COURT: All right.

3 MR. LEBETKIN: First of all, with
4 respect to Rule 41, the Governments states that we
5 were notified on the eve of trial. I do not deny
6 that. I would have to search my memory and consult
7 my colleagues as to whether or not it was the eve of
8 trial or the day after. But certain that was the time
9 of trial, it was then left to us to decide what would
10 be the proper point during the trial to ask for the
11 hearing and certainly, since we were not notified
12 well in advance of the trial, we felt that the most
13 propitious time would be when the Government intends
14 to offer that evidence, and that is at this time.

15 With respect to the question of
16 standing, the Government cites the case of Jones,
17 which is controlling, and the Government states there is
18 a 9th Circuit case which is not binding on this
19 Court, in my brief we have used the case of McHendrick
20 which I believe is in this Circuit, and the case that
21 is really controlling would be Brown against the United
22 States, a Supreme Court matter, which says -- which
23 said, in denying the application of that case --

24 THE COURT: Brown against the United
25 States is 411 United States 223, 1973?

1 MR. LEBETKIN: Yes, Judge, thank you.

2 And in that case, they said they would have been
3 entitled to a hearing if they had alleged that
4 they had standing at the time of the trial, which we
5 do allege.

6 And with respect to the statement
7 made by Mr. Dreyer about Blossy, I respectfully submit
8 that his position must be a consistent one, that he
9 shows no confidence in his own theory if he talks
10 about not offering Blossy's alleged statements to
11 Sergeant Trapeer on the interstate highway in New
12 Mexico. The fact is whether or not he is going to
13 offer his statements, the Government is offering the
14 incident and what flowed from there as a result of the
15 search.

16 With respect to the issue about the
17 conspiracy as to whether or not there is a separate
18 and distinct conspiracy, I submit to your Honor most
19 respectfully that although we are all aware that the
20 conspiracy theory generally is a dragnet theory, it
21 is not one to give the Government a license to allege
22 that anything that happened, although without knowledge
23 of certain other members of the conspiracy, is part of
24 a conspiracy, assuming arguendo that one member of
25 the -- one of the defendants sitting here was involved

1 in any conspiracy, and only for the purpose of this
2 argument will I make this statement. It is also
3 possible that he could be involved in more than one
4 conspiracy, in some other part of the country
5 without persons in this part of the country having
6 knowledge of it. And so that during the trial it
7 would be improper for the Government to try to
8 convince the Court that anything he did with anyone
9 else must have been pertinent to this conspiracy.
10 Also I do not think there is any evidence before the
11 Court to advance that theory.

12 So also with respect to Harold Levy's
13 alleged statement, that is an allegation made by a
14 witness which has not been tested by the jury yet.
15 The weight given to it by the jury is for the jury
16 alone to determine, and as far as we are concerned.
17 at this moment there is no statement by Harold Levy
18 for this purpose at this hearing.

19 THE COURT: Well, first I think there
20 is a question under Rule 41E of untimeliness, but I
21 am not really going to stand absolutely on that in
22 regard to the application for a hearing on suppression
23 based on the ground of illegal search and seizure,
24 because it is my judgment now, and it has been a quick
25 review, of course, in 20 minutes or so, that it is

1 apparent here, from what was discussed here orally
2 just now, and also from the reading of the defendants'
3 memorandum of law, that there is legally a lack of
4 standing here to have this application made in behalf
5 of these two defendants, I believe because the brief
6 is submitted by attorney Lebetkin and attorney
7 Lombardino, and outside of the case that Mr. Dreyer
8 cites, the 9th Circuit, even though I am not bound
9 by it, it would be persuasive but I think that is a
10 case well in point in the Second Circuit that I have
11 taken from my own files that I have for quick
12 research, and this is United States against
13 Tortorello, 533 F.2d. 809. It was decided April 1st,
14 1976, and it was written by Judge Gerfine, in that
15 case he goes into the Jones case that is relied upon
16 by the defendants here, and the reasons that that
17 ruling, of course, was talked about in the Brown case
18 that we just talked and that it was diluted by the
19 Simmons rule, but the case primarily says in its
20 conclusion that there was no standing here, in fact
21 they reversed Judge McMahon who had held there was
22 no standing in the District Court, and the Circuit
23 Court reversed and said there was a lack of standing.

24 There was not present, at the time
25 of this search, any interest, proprietary or



1 by offering the evidence here, is alleging that there
2 is a proprietary interest, even though the defendants
3 present here were not present at the scene.

4 The Government alleges that this
5 money was given by a co-conspirator in New York to
6 this Andrew Blossy to bring to Kevin Cooney, a
7 defendant at this trial. And certainly if they allege
8 that Kevin Cooney was to receive \$25,450, he had at
9 least a proprietary interest in that money. And with
10 respect to the question of possessory interest, I do
11 not believe that the cases hold that it is in the
12 conjunctive proprietary and possessory, it may be
13 either one, and even if you assume it was in the
14 conjunctive, this is a conspiracy to possess case,
15 and the way I read the Brown case, that possessory
16 interest would come under conspiracy also.

17 But nevertheless, certainly there was
18 a proprietary interest unless the Government
19 inconsistently says it is for one purpose, but not
20 for the other. If they say it is, then they should
21 either grant us consent to the hearing or they should
22 withdraw the evidence.

23 THE COURT: I am satisfied with my
24 ruling, I think you ought to read Tortorello. You will
25 see a review of these cases and Judge Gerfine points

1 out elements necessary to have standing, particularly
2 in a situation of this kind, and that is my ruling,
3 and you will have to abide by it.

4 MR. LEBETKIN: I certainly will,
5 Judge. I just want to make the record complete.

6 MR. LOMBARDINO: Your Honor, may I
7 be heard for the sake of the record in light of your
8 ruling?

9 First of all, your Honor, I respect-
10 fully submit that it does not only have to be a
11 proprietary interest. It said in Jones if that is
12 legitimate expectation in an interest that is
13 sufficient to acquire standing. As far as Brown versus
14 the United States, which your Honor aptly quotes,
15 I submit to your Honor that the reason that the
16 petitioners did not prevail in that case, because it
17 was not a crime charged by the Government dealing with
18 possession, that was a case where the defendants were
19 charged with transportation. In the case at hand, your
20 Honor, the Government has charged these people in a
21 conspiracy to possess marijuana for the purposes of
22 distribution.

23 In addition thereto, if your Honor
24 recalls, the Government's proof, in anyone conceded
25 that there was a proprietary interest here or a

1 legitimate expectation, it has been the Government's
2 your Honor recalls what Mr. Cohen said on that witness
3 stand, he said, again if believed, that he received
4 the sum of money or in the alternative, that an
5 automobile, a green Polara, was purchased by funds
6 belongings to the defendant Kevin Cooney.

7 Now, if that is to be believed by
8 your Honor, clearly there was certainly constructive
9 possession of that automobile by the defendant
10 Cooney. And if that is the conclusion, I submit to
11 you, your Honor, that is the only inescapable
12 conclusion that one can conclude based upon Cohen's
13 testimony. Then Cooney would have a proprietary
14 interest in that automobile, in addition thereto in
15 anticipation, the Government now tells us that they
16 are going to use officers in New Mexico who are going
17 to testify as to the stopping of this automobile and
18 the 25,000.

19 I am quite sure that Mr. Dreyer will
20 concede that it is the Government's position that that
21 \$25,000 was destined to Kevin Cooney and if that be
22 the case, and if that is what the Government is going
23 on, I urge the language again in the Jones case
24 that there was a legitimate expectation on the part of
25 Cooney and your Honor, I find that inescapable and

1 between the automobile and the expectation of this
2 money, I submit to the Court that Cooney has standing
3 to controvert the issue concerning the search.

4 THE COURT: I do not know whether
5 you are familiar with the Tortorello case.

6 MR. LOMBARDINO: I am familiar by name
7 and reputation, based upon Judge Gerfine's filing.
8 I have not read the case, your Honor.

9 THE COURT: But, no, I know there is
10 so much writing that it is hard to read all these
11 cases and all these different problems, but in that
12 case, Judge Gerfine says that the Jones dilemma had
13 been diluted by the Simmons exclusionary rule, but I
14 am satisfied from reading this case, that there is not
15 sufficient shown here to warrant a hearing on the
16 question of standing because I do not think there is
17 any standing apparent and I may be wrong, but that is
18 part of the judge's life to be wrong at times.

19 We also have the question of consent
20 and of course that may be elaborated upon in the
21 actual testimony before the jury.

22 MR. LOMBARDINO: How about the other
23 issue, your Honor, concerning the fact that this may
24 very well have been another conspiracy?

25 THE COURT: You mean in furtherance of

1 conspiracy?

2 MR. LOMBARDINO: Not in furtherance,
3 your Honor. It might very well be, and I think Mr.
4 Ryan is going to make argument now addressed to that,
5 that this might have very well been no part
6 of the conspiracy alleged in this indictment. This
7 may have very well been a separate venture and if
8 that be the case, your Honor, I would submit, then,
9 and strenuously so, that that has no
10 place in this trial.

11 THE COURT: No, I am content with my
12 ruling. I did not know Mr. Ryan was in this particular
13 problem, because I only had a brief signed by Mr.
14 Lebetkin and Mr. Lombardino.

15 I will let you speak.

16 MR. RYAN: That is because I do not
17 believe the defendant Kay has standing because the
18 Government's offer does not seek to infer that Bruce
19 Kay had anything whatsoever to do with this trans-
20 action.

21 So I am not claiming that Bruce Kay
22 has standing to complain about the search based on the
23 Government's proof and that is why I have not pressed
24 the issue.

25 Now, what I do complain about is that

1 this transaction occurs in September '74 and it
2 surrounds Andrew Blossy's driving of a car from
3 Ithaca, New York to Tucson, Arizona. And the grand
4 jury minutes of Mr. Blossy establish beyond any
5 question that this trip from Ithaca to Arizona had
6 really nothing to do with the Levy house that we have
7 heard about for these past three weeks and Arizona,
8 the Cooney to Levy trips that we have heard about
9 throughout the course of this trial. And how does
10 Mr. Blossy say in his grand jury testimony that this
11 trip came about? He does not say it came about
12 because Harold Levy asked him, in fact, he does not
13 know Levy. He did not even know Cooney. The

14 It comes from a man this jury never heard
15 of, Michael Hauser, Michael Hauser is alleged to,
16 according to Blossy, to have told him in Ithaca,
17 New York, that is not Crescent, not Old Latham,
18 New York, Blossy is told by Hauser, "For a certain sum
19 of money, will you drive this car to Arizona and call
20 a guy named Kevin and I will give you the number?"

21 Now, it may very well be that there
22 was some transaction that preceded this trip in a
23 car. There is no marijuana in the car, some residue in
24 the bag, but for all purpose there is no marijuana
25 in this car, and it could very well be that this trip

1 was a payment, this is the empty leg of a Tucson,
2 Arizona to Ithaca distribution of marijuana, and
3 there isn't one word in this case, as I recall it,
4 that the trips were being made from Arizona to Ithaca,
5 the trips in this case are being made and my client
6 is supposed to be involved in from Tucson, Arizona
7 to Harold Levy's house, so this is very -- it is
8 entirely conceivable, as you read Blossy testimony
9 and I am sure that is why Mr. Dreyer raised this
10 question, it is inescapable that a realistic
11 probability here is that this separate trip was a
12 lark on a Tucson to Ithaca transaction.

13 Blossy testifies in a grand jury
14 he never was in Albany until he testified before the
15 grand jury. Michael Hauser never even heard of Bruce
16 Kay, so Bruce Kay had nothing to do with the Ithaca
17 trip and there is no reason to believe, from all the
18 evidence that we have heard, that what we are on trial
19 for is an Arizona to Ithaca trip. And that is what
20 this trip was. It emanated from Ithaca, it is an empty
21 leg with cash down to Arizona. And I must say that if
22 this comes in, Bruce Kay is going to have an awful
23 tough time getting a trial here with the jury is
24 going to be able to segment the truth. They are going
25 to hear that there was \$25,000 in a car going from

1 Ithaca to Tucson, Arizona, and they are going to hear
2 that there was a telephone number that this fellow
3 Blossy was supposed to call, and it was Kevin Cooney's
4 and when the jury hears that they are going to say,
5 "You know, there at be something to the Cooney
6 operation," and then they are going to say, "Well,
7 Mr. Bruce Kay must have been part of it," when, in
8 fact, from the grand jury minutes of Blossy, it appears
9 that this was a separate Cooney venture, if you believe
10 Blossy. And I must judge that this transaction occurs
11 in September '74 and as I review the testimony in this
12 case concerning Bruce Kay, the last time he is
13 alleged to have been involved in the Albany end of
14 the distribution of marijuana is May of '74.

15 Katz testifies to an April '74
16 transaction, Roth testifies to an April '74 trans-
17 action, they are supposed to be separate transactions
18 in that same month, and Moscovitz says in May '74
19 there was a third transaction where, at Harold Levy's
20 house. So Bruce Kay acts with respect to the
21 distribution of marijuana from Tucson to Levy's house.
22 It ends on their proof of May '74.

23 Now, I know I am not unmindful of
24 this Camussa conversation, but that you must agree,
25 Judge, it is subject to serious question of credibility

1 about as far as Bruce Kay's acts, what he did, ended
2 in May '74, and I think when you take a realistic
3 appraisal of all the proof in this case and you read
4 the Blossy grand jury minutes and -- if your Honor has
5 the time, it seems to be that this Ithaca venture with
6 Blossy was a separate one, not connected with the
7 conspiracy we have been hearing about time and time
8 again from these witnesses.

9 THE COURT: Well, first you say
10 Ithaca is in the State of New York. You mean the
11 Northern District of New York?

12 MR. RYAN: Correct.

13 THE COURT: The time period runs
14 from '72 to '75?

15 MR. RYAN: Correct.

16 THE COURT: I am not sure that the
17 indictment and the overt acts confines the prosecution
18 just from trips to Tucson to Albany. I mean, it may
19 have happened in some distance but --

20 MR. RYAN: Well, Judge, you know, if
21 I sat here and I heard witnesses talking about a trip
22 to Ithaca, a trip to Binghamton, a trip to Albany at
23 Harold Levy's house, I would say, "Sure, the jury
24 could find that there was a conspiracy, Kay, Cooney,
25 Levy and even Lefebvre, that this conspiracy scope

1 was to go to Binghamton, Ithaca, Albany, Vermont, but
2 that is not what we have been hearing. The witnesses
3 have, time and time again, said that this was one
4 leg, Tucson, Arizona, Harold Levy's house in the
5 Albany area. And I think that the scope of the
6 conspiracy, according to the Government's proof,
7 particularly if you are going to hold my client
8 responsible for it, is that I understood that there was
9 a heavy distribution to the Albany area that he
10 participated in, not to Ithaca, Binghamton or any-
11 where else.

12 THE COURT: Wait a minute. I want
13 Mr. Dreyer to respond to this argument right now.

14 MR. DREYER: Yes, Your Honor.

15 THE COURT: He seems to indicate there
16 might be another conspiracy coming in the -- that
17 does not belong within this case.

18 MR. DREYER: As we said, your Honor,
19 the theory of the Government in this case is that there
20 has been sufficient proof in the form of testimony to
21 show that the persons who are sitting at this table and
22 other persons who were involved at the Albany end of
23 the operation, were fully aware of the scope of the
24 conspiracy. Once they were aware of the scope of the
25 conspiracy, their actions in the conspiracy bind

1 them to the overall conspiracy.

2 In this case, as I said before, Robert
3 Roth in 1973 was told by Mr. Cooney that shipments
4 were going to Ithaca and to other places. He then
5 came back to the Albany area and continued to share,
6 knowing -- that continued to share in distribution
7 at Mr. Levy's house, knowing what Mr. Cooney had told
8 him.

9 Then again, you heard from Mr. William
10 Katz, who testified that in November of 1974, he was
11 advised by Harold Levy that he sustained a loss from
12 that business, it -- or, excuse me, from that arrest
13 in New Mexico. Now, the point being that if Mr. Katz
14 is believed and his testimony concerning Mr. Cooney
15 and Mr. Levy's distribution and the profits is
16 believed, then the jury can infer that that money that
17 did go out there to Tucson, Arizona, allegedly to
18 Mr. Cooney, was money that belonged to some of these
19 conspirators, in other words, Mr. Levy and Mr. Cooney,
20 so there is proof there.

21 Or course these are statements made
22 by Mr. Levy to Mr. Katz and Mr. Katz is before the
23 jury, but nevertheless, Robert Roth has testified about
24 about Ithaca and now Mr. Katz's testimony ties in
25 with that to show that there is a relationship between

1 Harold Levy and that money. Thirdly, Paul Camussa,
2 whose testimony clearly showed that he had virtually
3 very little relationship with Harold Levy in this
4 case because in some instances he was not even
5 allowed by Mr. Katz to go to the home in Crescent,
6 nevertheless in November of '74, he decided to goto
7 Paul Moscovitz and ask Paul Moscovitz whether or not
8 Mr. Moscovitz can set him up with a connection in
9 Arizona. Moscovitz says, "I know Cooney's. I will
10 try to work it out." Mr. Camussa testified that a
11 week later, he called Mr. Moscovitz, or a couple of
12 weeks later he called him and Moscovitz said, to the
13 best of Camussa's recollection, "No, we can't set it
14 up because there has been some trouble with the driver
15 in Texas and some \$35,000 was seized."

16 Now, the point of this, your Honor,
17 is that the network of the conspiracy becomes clear
18 through the inter-relationship of the testimony of
19 four or five witnesses. They all knew what was going
20 on and when they committed an act in furtherance of
21 that conspiracy, they were bound by Mr. Cooney and
22 Mr. Hauser's acts in Ithaca and that is precisely
23 our theory in this case.

24 THE COURT: But this incident that
25 we are going to hear about, the New Mexico State police

1 and let us confine ourselves to say that there is no
2 question Kay won't be named or involved in it what-
3 soever. Just stand on the general principle of
4 conspiracy.

5 MR. DREYER: That is right. Mr. Kay
6 won't be mentioned. Mr. Lefebvre won't be mentioned.
7 Mr. Levy won't be mentioned, to the best of my
8 recollection.

9 THE COURT: I think it is a permiss-
10 ible act, allowable under this type of indictment, this
11 type of charge. Principles of settled law.

12 MR. RYAN: Let me now, out of the
13 presence of the jury, should that evidence be
14 admitted, I now make my motion, anticipation for severance
15 or a mistrial on behalf of Bruce Kay.

16 THE COURT: I deny the motion.

17 MR. LEONE: Judge, I join in that
18 motion on behalf of John Lefebvre, based upon Mr.
19 Dreyer's statements that Lefebvre was not even
20 mentioned in any way, shape or form, being present at
21 any of the conversations involving this New Mexico or
22 the Texas deal, and there is some question about
23 whether a person was seized in Texas or Arizona in
24 possession of a quantity of money and there has not
25 been any witness on that witness stand, your Honor, that

1 has implicated John Lefebvre other than maybe in
2 possession of marijuana. There has been no conversa-
3 tions alleged between John Lefebvre or any of these
4 witnesses or any of the defendants at this table that
5 he took part in any conspiracy and knew of the scope
6 of any conspiracy except that marijuana was being
7 sold in the Albany area.

8 For that reason, I ask that this
9 evidence be suppressed and, in the alternative, a
10 severance and a mis-- or a mistrial be declared for
11 John Lefebvre.

12 THE COURT: No, both motions denied.

13 MR. LOMBARDINO: Your Honor, may I
14 be excused? There is a phone call from Philadelphia.

15 THE COURT: Well, were you going to
16 say something?

17 MR. LOMBARDINO: Yes, I was, your
18 Honor. I was merely going to say, in light of the
19 argument proposed by the Government, if the Court is
20 now accepting the proposition that this transaction,
21 if you will, was part of this conspiracy, I again would
22 ask your Honor to reflect upon what the Government is
23 saying. They are saying that the money was destined
24 for the defendant Cooney and that is their argument,
25 your Honor, that he just made to you. Therefore, if

1 that money was being inspected as the Government says,
2 by Cooney, then I submit to your Honor he has
3 possessive interest in that money and therefore he
4 has standing to proceed with the hearing to suppress.

5 THE COURT: I am far beyond that point.
6 I do not think there is any possessory interest at all
7 shown.

8 MR. LOMBARDINO: Very well. Can I
9 get to the telephone?

10 THE COURT: Get your telephone call.
11 Do you mind if Mr. Lebetkin speaks outside of your
12 presence?

13 MR. LOMBARDINO: No, your Honor, I
14 do not.

15 MR. LEBETKIN: Judge, Mr. Dreyer
16 now attempts to convince this honorable Court --

17 THE COURT: Will you speak up,
18 please.

19 MR. LEBETKIN: He now attempts to
20 convince this honorable Court that because he has no
21 evidence to show that whatever Cooney and Hauser might
22 have been doing is connected to anyone else in this
23 case that he can substitute for evidence, mere
24 speculation, conjecture and surmise. And he even says,
25 I hope I quote him correctly, "They should have known,

1 and they must have known because Roth was told by
2 someone, that there might be something going on in
3 Ithaca." You know, the fact that you are told about
4 something is quite different than participating in it.
5 And if I am going to get together with Mr. Lombardino
6 to sell marijuana in Albany, and we will go to Arizona,
7 we will get it, one of us will live there, the other
8 will be here. And if I tell Mr. Lombardino there
9 might be something going on in Santa Fe, California,
10 that does not mean that because two years later I do
11 something in Santa Fe and he is bound by it because
12 he knows that I might be capable of doing something
13 like that.

14 The fact is that the question is
15 whether or not he has conspired with me and what I do
16 in Santa Fe is in furtherance of that conspiracy, and
17 whether or not he is benefitting by it. And I do not
18 think that it was the intention, the legislative
19 intention or the intention of the Court, in interpret-
20 ing the conspiracy statutes, that it will not only be
21 a dragnet but it is going to be so elastic that it is
22 going to be a catch-all, and all you have to do is
23 mention someone's name somewhere in a case and at
another end of the case, mention his name again in
connection with something else, and then the prosecutor

1 can stand up and say, "Well, if they knew it -- if
2 they did not know it, they should have known it or
3 they must have known it, and I cannot be expected to
4 bring that much evidence into the case, let us just
5 assume it."

6 So I know that there are a number of
7 cases on separate conspiracies, a number of cases on
8 variance in the -- between the proof adduced at trial
9 and the crime charged in the indictment, and that is
10 what we are being faced with here now, Judge, we have
11 a situation where the Government is now advancing
12 evidence of another case and if there is someone
13 sitting here who they think should be prosecuted for
14 another conspiracy without intending to point a finger
15 at anyone but for the purpose of the argument if that
16 is what they think, then they have the power to
17 prosecute for another case at an appropriate time and
18 an appropriate forum, but that is not our concern here.

19 I respectfully submit, Judge, that
20 on this question of variance, I had intended to go
21 over, at the end of the Government's case, a brief on
22 that very point. I did not feel it would be appropriate
23 to mention it before. However, the Government now
24 compels me to bring up that subject at this juncture
25 because of this issue and I am going to submit this

1 memorandum at this time, Judge, to be considered not
2 only at the end of the Government's case but to be
3 considered on this issue, and I must respectfully
4 hand this up to the Court, a defense memorandum of
5 law signed by me.

6 THE COURT: I wish you would give
7 me all the memorandum you intend to submit.

8 MR. LEBETKIN: That is the only one
9 I have at the present, Judge, unless Mr. --

10 THE COURT: Anything you think you may
11 raise, you may raise in these memorandums or something
12 should be submitted before trial, possibly.

13 MR. LEBETKIN: Well, I did not have
14 any way of knowing, Judge, that Mr. Dreyer was going
15 to press this issue now during the trial of an alleged
16 conspiracy between Arizona and Ithaca, and ask everyone
17 -- or -- to use their imagination to believe that it is
18 part of this trial, and I believe that I do answer
19 that proposition in this memorandum.

20 THE COURT: Well, I will take your
21 memorandum and review it.

22 MR. LEBETKIN: But on the subject of
23 this question, Judge, of introducing the evidence as
24 Mr. -- well, I think the arguments have been made quite
25 clear, Judge, and I would ask your Honor to reserve

1 decision until you have an opportunity to read this
2 memorandum.

3 THE COURT: No, I read it and I have
4 enough experience and stuff in my files on these
5 quest ions of standing and consent and so forth,
6 - Fortunately, that I can pick it up --

7 MR. LEBETKIN: I am not talking about
8 the standing and consent. You have made that ruling,
9 we will live with it.

10 THE COURT: I thought you were
11 talking about that.

12 MR. LEBETKIN: I am talking about
13 this argument.

14 THE COURT: This last memorandum you
15 gave me?

16 MR. LEBETKIN: Yes, the argument that
17 we make now that since your Honor has ruled that the
18 evidence is admissible insofar as the question of
19 suppressions concerned, that now we have to go to this
20 argument that we have all just advanced to you, and I
21 submit this brief in partial support of it, that if
22 it is not suppressible owing of having illegally been
23 obtained during the search, it is not admissible by
24 any means, owing that it is not part of the conspiracy
25 charged in the indictment just because it happens to

1 be in the State of New York, just because it also
2 happens to include the name of one of the defendants
3 here on trial, and that I would most respectfully
4 press a motion if your Honor should rule on -- that
5 it is admissible for a mistrial since it adversely
6 affects my client, Harold Levy.

7 THE COURT: Well, Mr. Dreyer, do you
8 have this second memorandum?

9 MR. LEBETKIN: I just handed it to
10 him.

11 MR. DREYER: Yes.

12 THE COURT: You just were handed it
13 now. Does it affect the calling of these two
14 witnesses because I want to call them.

15 MR. DREYER: Yes, your Honor. What
16 we are dealing with now is the last part of the
17 Government's case concerning New Mexico seizure and
18 the testimony of Agent Montagne, who had an alleged
19 telephone conversation with Mr. Cooney and --

20 THE COURT: I mean, is this brief --

21 MR. DREYER: This new brief, the
22 second brief, concerns multiple conspiracies, I
23 believe.

24 MR. LEBETKIN: Judge, if this does
25 not go in, if you should rule that this does not go

1 in, then as I understand it the Government's case
2 would be over. That is why I think it is appropriate
3 to cover this at this time.

4 THE COURT: You mean over in the
5 sense that they have finished calling their witnesses?

6 MR. LEBETKIN: Yes.

7 THE COURT: I see.

8 MR. LEBETKIN: As far as their case
9 is concerned.

10 MR. DREYER: But I believe what Mr.
11 Lebetkin says really goes to the issue of multiple
12 conspiracies, is that right, Mr. Lebetkin?

13 MR. LEBETKIN: Yes.

14 MR. DREYER: And we have already
15 made our position known to the Court on the record
16 as to why we believe that the multiple conspiracy
17 theory does not apply in this case.

18 THE COURT: All right. First, I am
19 going to file this as a Court Exhibit No. 1 so it will
20 be part of the record, the memorandum that was given to
21 me on the unreasonable search and seizure and the
22 declarations made by Blossy that I guess are not going
23 to be brought out by the prosecution.

24 I will file that brief as a court
25 exhibit so that the higher court, if it reaches there,

1 will know what we are talking about here.

2 On the second brief, I think we should
3 go forward and call our witnesses and I think this
4 involves just general principles of conspiracy,
5 because the first thing I see in the statement of
6 facts is that the indictment charges a conspiracy to
7 possess and distribute marijuana. There is a -- does
8 it charge that, Mr. Dreyer?

9 MR. DREYER: The conspiracy charge
10 charges the conspiracy to distribute quantities of
11 marijuana.

12 THE COURT: Mr. Dreyer, are you ready
13 to proceed?

14 MR. DREYER: Yes, your Honor.

15 THE COURT: Are these your last two
16 witnesses?

17 MR. DREYER: No, I have four more
18 witnesses. And then we have a few documents to put in
19 evidence.

20 THE COURT: Is that four including
21 these two, four altogether?

22 MR. DREYER: Yes, right.

23 THE COURT: Well, bring the jury in.
24 I am going to allow the testimony.

25 MR. LEBETKIN: I respectfully except.

1 (Jury enters Courtroom).

2 THE COURT: All right. Call your
3 witness.

4 MR. DREYER: The Government calls
5 Robert Tripeer.

6 ROBERT TRIPEER,
7 having been called as a witness in behalf of
8 the Government, was first duly sworn according to
9 law and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. DREYER:

12 Q Mr. Tripeer, what is your occupation?

13 A Sergeant on the New Mexico State Police Department.

14 Q Where are you stationed, Mr. Tripeer?

15 A Las Cruces, New Mexico.

16 Q Where is Las Cruces, New Mexico?

17 A Approximately 40 miles north of El Paso, Texas
18 and Juarez, Mexico.

19 Q Can you tell the jury where it is located, with reference to
20 Tucson, Arizona?

21 A It would be approximately 225 to 250 miles east of
22 Tucson.

23 Q Speak up, please. How long have you been employed by
24 the New Mexico State Police?

25 A 11-1/2 years.

1 Q Were you so employed in September of 1974?

2 A I was.

3 Q I direct your attention to the 27th of September 1974.
4 Were you on duty that day?

5 A Yes, I was.

6 Q And what was your specific duties -- what were your
7 specific duties on that day?

8 A I was working traffic patrol north of Las Cruces at
9 Interstate 25.

10 Q Would you describe for the jury what Interstate 25 is?

11 A It is the interstate that runs from El Paso, Texas to
12 Albuquerque, New Mexico and on up to Denver, Colorado.

13 Q Now, do you recall anything unusual occurring to you
14 on September 27, 1974?

15 A Yes. sir.

16 Q Would you describe for the jury what you recall?

17 A Approximately 1:45 --

18 THE COURT: Wait a minute.

19 MR. RYAN: I just object on behalf of
20 defendant Kay. I do not believe it has anything to do
21 with this transaction.

22 MR. LEONE: I also object on behalf
23 of John Lefebvre, same grounds.

24 MR. LEBETKIN: I join that objection
25 on behalf of Harold Levy.

1 MR. LOMBARDINO: And I object for
2 the reasons heretofore stated not in the presence of
3 the jury.

4 THE COURT: Overruled. The previous
5 reasons were stated.

6 BY MR. DREYER:

7 Q You stated that something happened at 1:45. What
8 happened at 1:45?

9 A At 1:45 p.m., I clocked a vehicle traveling in excess
10 of 70 miles an hour in a 55-mile-an-hour zone from the
11 Garfield Overpass, again which is approximately 50
12 miles north of Las Cruces.

13 Q After you clocked the automobile what, if anything,
14 did you do?

15 A I stopped the vehicle and approached the driver, who
16 is a Mr. Andrew Blossy.

17 Q How did you determine his name?

18 A Through a driver's license he presented to me when I
19 asked him for his driver's license and registration of
20 the car.

21 Q Now, you observed his registration also?

22 A Yes, sir.

23 Q Do you recall what the registration showed?

24 A The car, according to the New York registration, was
25 registered to a Richard Cihocki.

- 1 Q Now, after you stopped the automobile, did you have
2 occasion to talk to Mr. Blossy?
- 3 A Yes, I did.
- 4 Q Would you tell us what Mr. Blossy said? What did you
5 do after the conversation?
- 6 A Okay. After the conversation, I went back to my
7 patrol unit --
- 8 Q First, did there come a time when you examined the
9 automobile?
- 10 A Yes, sir.
- 11 Q Did you do that in the presence of Mr. Blossy?
- 12 A Yes, I did.
- 13 Q What did you do first?
- 14 A Are you talking about after I looked at his driver's
15 license and registration?
- 16 Q Yes.
- 17 A But you don't want to know what we talked about?
- 18 Q No. Just tell us what you did after that.
- 19 A Okay. I observed a -- two boxes of heavy-duty shock
20 absorbers in the back seat.
- 21 Q And were they in the box or outside the box?
- 22 A They were inside the box.
- 23 Q Well, describe the box for the jury.
- 24 A About that long, about two feet long, and approximate-
25 ly two inches square. (indicating).

1 Q And you saw that the box had shock absorbers in it or
2 you saw writing on it?

3 A I saw writing on it, and -- well, I didn't know
4 whether the shock absorbers were in it.

5 Q When did you find out they were shock absorbers?

6 A Upon inventorying the vehicle when he --

7 Q Now, did there come a time when you examined the
8 vehicle further?

9 A Yes, I did.

10 Q When did you do that?

11 A Approximately five minutes later.

12 Q And where specifically did you look in the automobile?

13 A In the trunk.

14 Q And was Mr. Blossy present when you opened the trunk?

15 A Yes, he was. He opened the trunk himself.

16 Q Now, when you opened the trunk, what, if anything, did
17 you see?

18 A A back pack and two suitcases.

19 Q Describe the suitcases.

20 A They were canvas. I don't recall the color. They had
21 zippers that opened up, a flap on top of them.

22 Q What did you do after you saw the suitcases?

23 A Well, when he opened the trunk, I observed an odor of
24 what I --

25 Q All right. You smelled an odor, that is your testimony?

1 A Yes, sir.

2 Q All right. Now, at that time, how long had you been
3 a police officer?

4 A ~~Oh~~ -- well, at that time a little over nine years.

5 Q And when you opened that trunk, did you recognize the
6 odor?

7 MR. LOMBARDINO: Objection.

8 THE COURT: What ground?

9 MR. LOMBARDINO: The ground there has
10 been absolutely no foundation to submit this man to be
11 an expert.

12 MR. DREYER: I am laying the founda-
13 tion now, your Honor.

14 MR. LOMBARDINO: Your Honor, he is
15 not laying a foundation, he has asked what he smelled.

16 MR. DREYER: I did not.

17 THE COURT: All right.

18 MR. LOMBARDINO: He asked if he
19 recognized the odor.

20 BY MR. DREYER:

21 Q Yes or no, answer.

22 MR. LOMBARDINO: I object to that
23 without a proper foundation being made, and if he is
24 going to lay a foundation, I would ask for a voir dire.

25 THE COURT: Overruled. I am going to

1 allow him to lay the foundation. You should lay it,
2 I mean, through his experience in this type of odor --

3 BY MR. DREYER:

4 Q Did you recognize the odor at that time, yes or no?

5 A Yes.

6 Q Now, prior to the time that you opened the trunk of
7 Mr. Blossy's automobile, what were your other duties
8 in the New Mexico State Police?

9 A Supervisor over 10 patrolmen.

10 Q Speak up.

11 A I am a supervisor over 10 -- 10 patrolmen. I work in
12 Dona Ana County.

13 Q What were some of your duties at that time?

14 A Checking all the records that came in from the
15 patrolmen. I also assist in custody of evidence.

16 Q Now, as custodian of evidence, did you have occasion,
17 from time to time, to come into contact with certain
18 types of material that were brought into the station?

19 A Yes.

20 Q What types of evidence did you deal with?

21 A Guns, liquor, narcotics.

22 Q Now, when narcotics came in to you as the custodian of
23 evidence, did you ever observe any marijuana that came
24 into your Station?

25 A Yes.

1 Q On how many occasions, would you say?

2 A Oh, approximately 15 or 20.

3 Q In addition to being the custodian of the evidence, did
4 you ever arrest anybody for possession of marijuana?

5 A Yes.

6 Q How many times, prior to September 27, 1974?

7 A Forty to fifty times.

8 Q Based on your arrest of those individuals, did you
9 come in contact with marijuana?

10 A Yes, I did.

11 Q As a result of your contact with marijuana and as a
12 result of your being a custodian of evidence, were you
13 able to detect the odor of marijuana?

14 MR. LOMBARDINO: I object.

15 THE COURT: Overruled.

16 BY MR. DREYER:

17 A Yes, I was.

18 Q Have you ever testified in a court of law concerning
19 marijuana before?

20 A Yes.

21 Q How many times?

22 A At least ten.

23 Q And in those trials, did you ever testify that you knew
24 the odor of marijuana?

25 A Yes, I did.

1 Q Now, when you opened the trunk of Mr. Blossy's car,
2 did you recognize the odor?

3 A Yes, I did.

4 Q Do you have an opinion as to what that odor was?

5 A Yes, sir.

6 Q What is your opinion?

7 A That it was marijuana.

8 Q What did you do after you detected the odor of
9 marijuana?

10 A I opened the suitcases.

11 Q And what did you find?

12 A I found debris that appeared to me to be seeds and leaf
13 parts of marijuana.

14 Q Where was it located in the bag?

15 A On the bottom.

16 Q How much of a debris was there?

17 A I believe, upon weighing it, it was approximately two
18 ounces.

19 Q Now, did there come a time when you searched the bag
20 more carefully?

21 A Yes, sir.

22 Q What else did you find?

23 A I found a box approximately two inches square,
24 approximately six inches long, with an envelope taped
25 to the top of it.

1 Q What did you do after you found that box?

2 A I opened the envelope.

3 Q What did you find in the envelope?

4 A Numerous bills of different denominations, from 10
5 through 100.

6 Q Did there come a time when you opened the box?

7 A Yes.

8 Q What did you find in the box. Describe it for the
9 jury.

10 A More numerous bills from -- denominations from 10
11 through 100's.

12 Q And did you count those bills at that time?

13 A No, I didn't.

14 Q What, if anything, did you do after you found the bags
15 and the money?

16 A Went back to the patrol car and called for assistance.

17 MR. LOMBARDINO: I object to what he
18 did over the air.

19 BY MR. DREYER:

20 Q Did there come a time when you called for assistance?

21 A Yes, sir.

22 Q Do you recall who you called?

23 A Yes, sir.

24 Q Who?

25 A The narcotics sergeant for our district.

1 Q What was his name?

2 A Sergeant Charles Ring.

3 Q Did there come a time when Sergeant Ring appeared
4 on the scene?

5 A Yes, sir.

6 Q When?

7 A Approximately 30 minutes after I called.

8 Q And did there come a time when you spoke to Sergeant
9 Ring?

10 A Yes, sir.

11 Q What, if anything, did you do with the money in the
12 clothing bags that you observed?

13 A I turned them to Sergeant Ring for further investiga-
14 tion.

15 Q What, if anything, did you do with the box located in
16 the back seat of the car?

17 A I turned them over to him also.

18 Q Did you have an opportunity to open the box after you
19 took it from the back seat of the automobile?

20 A Are you talking about the box that said "Shock
21 Absorbers"?

22 Q Yes.

23 A I don't recall opening it.

24 Q Do you recall giving them to someone?

25 A Yes, I gave all these things were given to Sergeant

1 Ring at the time, at the scene.

2 MR. DREYER: No further questions.

3 THE COURT: Mr. Lombardino?

4 CROSS-EXAMINATION

5 BY MR. LOMBARDINO:

6 Q Sergeant Tripeer, you say you supervised some 10
7 men?

8 A Yes, sir.

9 Q And you examine and read their reports as they submit
10 them to you, that they use in conjunction with their
11 investigation?

12 A Yes, sir.

13 Q And would you say that that is an important part of
14 your investigation or job, rather, to examine these
15 reports of your subordinate officers?

16 A Yes, sir.

17 Q Now, do you have with you today the reports you
18 prepared in regard to this incident?

19 A Yes, sir.

20 Q May I see them, please.

21 (Witness hands documents to Mr.
22 Lombardino).

23 MR. LOMBARDINO: May I approach the
24 witness?

25 THE COURT: Sure.

(Jury not present).

THE COURT: All right. I was ready some time ago to come out to hear Mr. Ryan's motion or application. I think along the single conspiracy problem that arises sometimes in these cases but we have been held up beyond that and I understand that there has been interviews made of certain witnesses.

MR. RYAN: Right.

THE COURT: So do you want to state your position for the record?

MR. LOMBARDINO: Yes, your Honor. Mr. Dreyer was gracious enough to arrange through Mr. Hauser's attorney an interview with which myself and all the defense lawyers participated, in which we spoke to what we believe to be the next Government's witness, one Michael Hauser.

THE COURT: I see, all right.

All right, Mr. Ryan.

MR. RYAN: Your Honor, I submitted to your Chambers and to Mr. Dreyer two cases, United States against Miley and United States against Bertolini.

THE COURT: I do not like to say too much, but I do for the Court of Appeals, Second Circuit, I anticipated it might come up and I read it.

1 I have the slip opinion, United States against Miley
2 cited March 19, 1975, written by Judge Friendly.

3 MR. RYAN: Correct, and I also
4 submitted a report by the Drug Enforcement Agency made
5 during the course of the investigation, which I would
6 like to have marked as part of an exhibit.

7 It has a diagram of what the Drug
8 Enforcement Agency understood to be the Cooney
9 operations and you will see on that diagram, Judge,
10 just as you saw in the 'Miley case and you read
11 about in the Bertolitticase, that the Ithaca operation
12 was a separate, independent operation and had
13 different members in it. If you look in the chart
14 under "Ithaca," you will see "Michael," I think "Last
15 name unknown." That is Michael Hauser, "Tony, last
16 name unknown," and I think a "Marty, last name
17 unknown." You will find not one word or mention of
18 our clients in that Ithaca operation, and to the
19 right of the Ithaca chart, you will see the Albany
20 line-up, about the Albany operation, and there you will
21 find are the clients and witnesses in this case,
22 Katz, Kay, Levy, Lefebvre and others. And I think,
23 as I told your Honor yesterday, I really was under the
24 distinct impression that the \$25,000 Blossy incident
25 was unrelated to the conspiracy we have been trying

1 here, the agreement between these defendants and --
2 in light of the evidence, the agreement that the
3 marijuana would go from Tucson to Levy's house and be
4 distributed in the Albany area. I do not know how
5 anyone can say, from the evidence, that that was the
6 agreement, that the Government is proving here in this
7 case, and that is the agreement that the overt acts
8 talk about in the conspiracy indictment.

9 Now, I have since had an opportunity
10 this morning, the first time, to interview Michael
11 Hauser, and Michael Hauser would give your Honor
12 testimony which would demonstrate that his involvement
13 with Cooney in the Ithaca operation had nothing what-
14 soever to do with Levy, Kay, Lefebvre, Roth, Katz and
15 the others in this case, and that his dealings with
16 Cooney in this regard was wholly independent of any
17 Albany operation. And the \$25,000 related to --

18 THE COURT: Did he say he had dealings
19 with Cooney? Is he going to testify to that?

20 MR. RYAN: He would say that the money
21 was going down to buy pot from Cooney. Now, that gets
22 down, as far as Cooney is concerned, is the same as
23 offering evidence of another crime against Cooney.
24 That is what it would boil down to, in my judgement,
25 evidence of another crime.

1 THE COURT: I do not agree with that.
2 You may have that judgement. At least there is some
3 involvement by Hauser of Cooney --

4 MR. RYAN: Correct, that is what --

5 THE COURT: -- in Ithaca.

6 MR. RYAN: This was the suspicion:
7 I had reinforced by non-hearsay evidence by
8 Michael Hauser. Now, I know Mr. Dreyer referred to
9 some of the witnesses here.

10 THE COURT: Conversations?

11 MR. RYAN: Conversations with Katz
12 and Levy, Okay, and the inference from their conversa-
13 tions is that the witness with Levy -- was that some-
14 how the \$25,000 related to the Albany operation, okay.
15 But the best proof of that will be not only the
16 D.E.A.'s own evaluation and chart, and not only the
17 identities of the parties in the Ithaca operation as
18 opposed to the parties in the Albany operation, but
19 HaUser. That no matter what these witnesses said,
20 the \$25,000 had nothing to do with the Albany
21 operation, that was a separate Ithaca operation.

22 Now, you take --

23 THE COURT: Wasn't the testimony
24 along the lines that it sort of dampened the Albany
25 operation, that we had trouble and and one guy said

1 "Texas" --

2 MR. RYAN: Judge, that may have been
3 testimony from accomplices on hearsay statements, and
4 that is -- that was really coming in subject to
5 connection. The connection would be established --
6 or the non-connection would be established by competent
7 non-hearsay evidence of Michael Hauswer. The
8 unreliability of those statements, that these witnesses
9 testified to, would be demonstrated by the competent
10 proof of Michael Hauser, and I do not think the Judge
11 will have any problem on the credibility of
12 Michael Hauser in own view of the D.E.A.'s own evidence
13 in this case as shown by that chart, Your Honor, and
14 there is one further thing.

15 THE COURT: The credibility will be
16 for the jury. It is unusual to have to say there is
17 no question --

18 MR. RYAN: Judge, if this comes in
19 when Bruce Kay and the evidence against Bruce Kay
20 shows that if he was involved, he was involved in the
21 Albany operation, he had no reason to believe or
22 suspect that the agreement that he was participating in
23 had to do with shipments going to Ithaca and Michael
24 Hauser, Michael Hauser never heard of Bruce Kay. The
25 only fellow that Michael Hauser knew --

1 THE COURT: That happens, as you know,
2 and it has been written in the Second Circuit, some
3 conspirators never see each other, ~~knew~~ nothing about
4 it as long as it is a continuing chain, the same
5 conspiracy.

6 MR. RYAN: Right. The same chain, but
7 here you have two chains. You have a chain from
8 Tucson to Ithaca with certain parties, Cooney is the
9 only common denominator between the chain to Ithaca
10 and the chain to Albany.

11 THE COURT: That might be competent
12 enough right there.

13 MR. RYAN: Judge, if you look at the
14 Miley case and see that chart --

15 THE COURT: I have read it.

16 MR. RYAN: -- and you saw the chain
17 on the left with those defendants, they were defendants
18 and there was a fellow on the right, Veragos, I
19 believe his name is.

20 THE COURT: Yes.

21 MR. RYAN: Okay, and the Court said
22 that there was no reason to believe that Veragos
23 had anything to do with the parties on the left and
24 there was no reason to believe the parties on the left
25 had anything to do with the right, and they said it was

1 a separate conspiracy, but then they said there was
2 no prejudice.

3 THE COURT: Each one depends on its
4 own facts. You did give me United States against
5 Bertolitti, 529 F.2d. 149, 154, I think the pages are,
6 to 157, that came after this Miley case. It was
7 written by Judge Van Graffland, November 1975, and in both
8 of these case, of course they reject this connection
9 that there was --

10 MR. RYAN: Only on grounds of
11 prejudice. They said there were separate conspiracies,
12 but the presence was not substantial enough. Now, in
13 this case there is no reason to believe if you take
14 the Government's evidence that Bruce Kay had anything
15 whatsoever to do with an Ithaca operation or that he
16 knew Michael HaUser or anybody else involved in the
17 Ithaca operation.

18 THE COURT: Well, it is an incident
19 that is portrayed more by testimony as part of a
20 conspiracy.

21 MR. RYAN: Judge, I want to offer the
22 testimony of Michael Hauser in support of my motion.

23 THE COURT: The what?

24 MR. RYAN: The testimony of Michael
25 Hauser in support of my motion.

1 THE COURT: I did not hear.

2 MR. RYAN: I want to offer the
3 testimony of Michael Hauser under oath before your
4 Honor to demonstrate to you that there was no
5 connection between this \$25,000 seizure, the Ithaca
6 operation, and Kay and Lefebvre and Levy.

7 THE COURT: I think the thing is
8 getting far out of proportion to what it really is in
9 relation to this conspiracy that is the charge in this
10 indictment. I do not see the substance that you claim
11 is present here, prejudice to any of these defendants.
12 I think, Mr. Dreyer, you should answer, because it is
13 your case as far as the prosecution's testimony.

14 MR. LEONE: Before Mr. Dreyer answers,
15 I join in Mr. Ryan's application to preclude Mr.
16 Hauser from testifying based on all the arguments used
17 by Mr. Ryan, and also join in his application to have
18 Mr. Hauser placed on this stand in the absence of the
19 jury for your own Honor's perusal of his testimony.

20 THE COURT: We have to move along now.
21 That may be something that a judge should not keep in
22 mind all the time, but we will be here until Christmas.
23 Maybe that is one of the purposes of carrying a --
24 hearing a lot of testimony.

25 MR. RYAN: Judge, if I could persuade

1 the merits of my motion, we could be summing up
2 Friday because the rest of this case is all on this
3 Blossy incident, which is unrelated to the agreement.

4 THE COURT: I am going to hear
5 Mr. Dreyer because here is one incident that you want
6 to put in in your case that seems to be pointed to as
7 one of great magnitude that is going to destroy all of
8 the other charges.

9 MR. DREYER: First of all, to put
10 this in perspective, Mr. Ryan has alluded to a chain
11 conspiracy, and then has said in this particular case
12 the Blossy incident will show two chains, in effect the
13 Government will point out that the case law in the
14 Second Circuit establishes two types of conspiracy,
15 one is a chain conspiracy and the other what is known
16 as a spoke or wheel conspiracy, and the Second
17 Circuit has recognized that at the end of a chain
18 conspiracy, the chain conspiracy being one where you
19 have a common suppliers, buyers and distributors, you
20 may have a situation where a spoke or wheel
21 conspiracy arises that is, let us assume, that the
22 supplier in a given chain conspiracy does have
23 spokes jutting out to other conspirators across the
24 country. And I think what Mr. Ryan has said is that
25 in this particular case, Kevin Cooney had a separate

1 spoke.

2 MR. RYAN: I do, correct.

3 MR. DREYER: That he had a separate
4 spoke to Michael Hauser in Ithaca.

5 Now, in his treatise on Federal
6 Practice and Procedure, Wright, at page 332 of
7 Volume 1, has said this about the wheel conspiracy:
8 "The difference thought to exist between them" --
9 that is the wheel conspiracy and the chain conspiracy
10 -- "is that in a wheel conspiracy it is said that
11 there must be proof that those at the spoke knew of
12 the existence of the other spokes and thus knowingly
13 participated in a single, overall conspiracy."

14 MR. RYAN: Correct.

15 MR. DREYER: Now, in this particular
16 case, it is clear that from at least 1973 through 1974
17 that kind of information was available to witnesses
18 who testified here and who were right in the middle of
19 the Albany part of the operation. If this is a spoke
20 conspiracy or if there were spokes to other cities, it
21 is clear that all of these people were operating in an
22 overall conspiracy. Nevertheless, this may not be a
23 spoke conspiracy. That is merely a defense allegation
24 that it is a spoke conspiracy. In effect it may in
25 fact be a chain conspiracy just by virtue of the fact

1 that there is a common supplier, a co-mingling of
2 funds as testified by Katz, the common supplier, by
3 the way, being Kevin Cooney, common headquarters,
4 Tucson, Arizona, and I am getting these facts
5 right out of the Tralenti case which appears in the
6 same volume as the Miley case.

7 THE COURT: Well, the Miley case you
8 should give Citations 513 P.2d. 1191. So I guess we
9 are agreed that Hauser, at least, is going to
10 implicate Cooney to some extent, Mr. Dreyer.

11 MR. DREYER: Your Honor, I must say
12 that I have not interviewed Michael Hauser.

13 THE COURT: I do not know --

14 MR. DREYER: No, Judge, I am just
15 going to put him on and go on from there.

16 MR. RYAN: Well, that is all the more
17 reason, Judge, why I would like to have this testimony
18 elicited out of the presence of the jury.

19 THE COURT: No, I am not inclined at
20 all to do it. Something of that substance would
21 make me hesitate, and because I am a judge of great
22 caution --

23 MR. RYAN: I know you are, Judge.
24 Then I would like, in support of this motion, to mark
25 the Blossy grand jury minutes as it further establishes

1 in my judgment, that this \$25,000 had nothing to do
2 with the conspiracy we are trying in this case.

3 THE COURT: Well, you can mark it,
4 but I think under our particular facts and particularly
5 the recitation of facts that Mr. Dreyer gave yester-
6 day as far as the conversation of other witnesses, I
7 think it might be considered a chain conspiracy. So my
8 ruling is to allow Hauser, whom I guess Mr. Dreyer has
9 not even interviewed --

10 MR. RYAN: Yes, which is very
11 dangerous, Judge. The Government puts a witness on
12 the stand without any reasonable expectation.

13 THE COURT: It is also very fair when
14 he does it, but he allows you to interview him. It
15 is unusual.

16 MR. RYAN: I have no objection to Mr.
17 Dreyer interviewing Hauser. That may be a decision
18 between Hauser and his attorney and Mr. Dreyer.

19 THE COURT: Well, he is conducting his
20 case.

21 Mr. Lebetkin?

22 MR. LEBETKIN: Your Honor, in support
23 of this argument advanced by Mr. Ryan, I would just
24 like to point out one thing, that there has been a
25 prejudice at this trial by reason of the way the

1 Government has presented certain evidence and I
2 recognize the right of the Government in a conspiracy
3 case to present evidence of some -- someone joining a
4 conspiracy before he makes out the conspiracy itself.

5 I know that the law permits that. But
6 there is a prejudice here and there is an illusion,
7 Katz testified that Harold Levy made a statement with
8 respect to the \$25,000 and that is before the
9 testimony of Hauser comes in. Now that statement --
10 that Katz made is obviously a hearsay statement and it
11 would be admissible against Levy if the connection to
12 the conspiracy was first made out, but I respectfully
13 submit that after your Honor hears Hauser's testimony
14 you will realize that Hauser is not connected to Katz
15 or Levy or Roth or Moscowitz or anyone who has been
16 here at this trial. And that therefore it may well be
17 that I would be obliged after that to move to strike
18 any prior testimony which anyone gave with the alleged
19 statement by Levy and the \$25,000 because it would then
20 become in the category of not being accepted under the
21 hearsay rule since the foundation was not laid, but
22 never proven. And I would respectfully submit that
23 under the cases as I understand them, I could not have
24 a chain conspiracy, a spoke conspiracy or wheel
25 conspiracy or any kind of conspiracy unless in this

1 case or in the other case you could show that the
2 parties knew someone else and in this case it could
3 not be made out just by showing that he knew Cooney,
4 because obviously in distinguishing between one kind
5 of a conspiracy and the other there is always
6 testimony by one person that he knew at least one
7 other person and in this case it would be Cooney
8 and the question arises whether, in addition to
9 knowing Cooney or a Cooney, he would know anyone else
10 there and that would be absent from this case, and that is
11 why I believe Mr. Ryan made that offer of proof.

12 THE COURT: I have made my mind up.

13 MR. RYAN: Okay, Judge.

14 THE COURT: So we will bring in the
15 jury. Is Mr. Hauser your next witness?

16 MR. DREYER: Yes, your Honor.

17 THE CLERK: Judge, I have marked
18 Defendants' Exhibit O for identification, transcript
19 of Blossy's testimony before the grand jury, January 7
20 1976.

21 (Jury enters Courtroom).

22 THE COURT: All right, Mr. Dreyer.
23 Call your next witness.

24 MR. DREYER: The Government calls
25 Michael Hauser....

1 MICHAEL HAUSER,
2 having been called as a witness in behalf of
3 the Government, was first duly sworn according to
4 law and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. DREYER:

7 Q Mr. Hauser, where do you live?

8 A New York City.

9 Q And how long have you lived there?

10 A About four months.

11 THE COURT: Speak up.

12 A About four months.

13 Q Now, I direct your attention to September of 1974.

14 Where did you live in September of 1976?

15 A Ithaca, New York.

16 Q Did you live with someone or by yourself?

17 A I lived with someone.

18 Q Can you tell us his name?

19 A It was my girlfriend.

20 Q Now --

21 THE COURT: Speak up, please. The
22 jurors have to hear you and the lawyers have to hear.
23 Speak right up.

24 Q Did there come a time, in September of 1974, when you
25 met a man by the name of Andrew Blossy?

1 A Yes.

2 Q How long had you known Mr. Blossy prior to 1974?

3 A For about six years.

4 Q And do you recall when you met him in September of
5 1974, the approximate date?

6 A It was the middle of the month.

7 Q And do you recall where you met him?

8 A At my house.

9 Q And can you tell the members of the jury for what
10 purpose you met Mr. Blossy at your house?

11 A He was to drive an automobile for me.

12 Q Now, do you recall the meeting? Do you have a
13 picture in your mind of meeting with Mr. Blossy?

14 A Yes.

15 Q What did you tell him and what did he say to you?

16 A I asked him to drive a car for me and take some money,
17 and he said he would.

18 Q Now --

19 MR. RYAN: I am sorry. Where did this
20 occur?

21 MR. DREYER: At his house.

22 MR. RYAN: In Ithaca?

23 MR. DREYER: Yes.

24 BY MR. DREYER:

25 Q Do you recall the address?

1 A Yes. It was 5 Hallwood Drive.

2 Q Now, how soon after Mr. Blossy responded that he would
3 drive did he leave the Ithaca area, or did there come
4 a time when he did leave?

5 A He left the next day.

6 Q Prior to his leaving, did you give him some
7 instructions?

8 A I told him to drive to Arizona. I told him the routes
9 and to make a phone call when he got there, and then
10 to fly home.

11 Q Now, regarding the phone call, did you give him some
12 instructions concerning a telephone number?

13 A I gave him a number.

14 Q What was the number, do you recall?

15 A No.

16 Q Do you recall whose phone number you gave him?

17 A Yes.

18 Q Whose phone number?

19 A It was Kevin's; Kevin Cooney.

20 Q Now, in addition to the phone number that you gave to
21 Mr. Blossy, did you give him anything else?

22 A Two suitcases.

23 Q Can you describe the suitcases that you gave him?

24 A They were large suitcases.

25 Q And did you put anything inside of those suitcases?

- 1 A No.
- 2 Q Did you give him anything in addition to those suit-
- 3 cases?
- 4 A Money.
- 5 Q Do you recall how much money?
- 6 A 25,000.
- 7 Q Now, did you give him anything else?
- 8 A No.
- 9 Q Did you give him an automobile or did he use his own?
- 10 A I gave him an automobile.
- 11 Q Whose automobile did you give him?
- 12 A It was a man named Richard Cihocki.
- 13 Q In addition to the phone number that you gave to --
- 14 did you give Mr. Blossy any other phone numbers in
- 15 addition to the one?
- 16 A My own.
- 17 Q You gave him your own?
- 18 A Yes.
- 19 Q Was the telephone registered in your own name?
- 20 A No, I believe it was registered in my girlfriend's
- 21 name.
- 22 Q Now, did there come a time when you saw Andrew Blossy
- 23 again?
- 24 A Yes.
- 25 Q When did you see him again?

1 A About a week later..

2 Q And where did you see him?

3 A In Ithaca.

4 Q And under what circumstances did you see him?

5 A I picked him up at the bus station.

6 Q And did he tell you something at that time?

7 A Yes.

8 Q Would you tell us what he told you? Did you do some-
9 thing in response to his statement to you?

10 A No.

11 Q Did there come a time when you spoke to a Mr. Kevin
12 Cooney?

13 MR. LOMBARDINO: I object to it.
14 Leading.

15 Your Honor, may I have a moment,
16 please, a telephone call from New York City to me, or
17 can I have Mr. Juliano --

18 THE COURT: Can somebody else take it?
19 Yes.

20 MR. LOMBARDINO: Thank you...

21 (Mr. Juliano leaves Courtroom).

22 MR. LOMBARDINO: Thank you, your Honor.

23 THE COURT: No, I overrule the
24 leading, he has just asked if he had a conversation
25 with Kevin Cooney.

1 Q After Mr. Blossy returned, did there come a time when
2 you spoke to Mr. Cooney?

3 A Yes.

4 Q Do you recall how soon after Mr. Blossy returned that
5 you spoke to Mr. Cooney?

6 A It was soon after, but I am not sure when.

7 THE COURT: Speak up now. --

8 A It was soon after.

9 Q And do you recall the conversation?

10 A No.

11 Q Do you remember what you said to Mr. Cooney?

12 MR. LOMBARDINO: I object. The witness
13 says he did not and Mr. Dreyer now presses him as
14 though he was cross-examining the witness, that he
15 does not remember the conversation.

16 THE COURT: No, I think first you should
17 fix the time of conversation. How did it occur? I
18 do not know whether it is a telephone call or --

19 BY MR. DREYER:

20 Q Did you have a telephone conversation with Mr. Cooney?

21 A Yes.

22 Q Again, how soon after Mr. Blossy returned?

23 A Relatively soon. I am not sure of the exact time.

24 Q Where were you when the phone conversation took place?

25 A In Ithaca..

1 Q In Ithaca?

2 A Yes.

3 THE COURT: Did you call him up?

4 THE WITNESS: Yes, I did.

5 THE COURT: All right.

6 BY MR. DREYER:

7 Q And when you called him up, what did you say to him?

8 A I don't remember.

9 Q Do you remember what he said to you?

10 A No, I don't.

11 Q Now, directing your attention to the money that you
12 gave him, can you tell the members of the jury who
13 owned that money?

14 A Me.

15 THE COURT: Did you say it is your
16 money?

17 THE WITNESS: Yes.

18 THE COURT: \$25,000?

19 THE WITNESS: That's correct.

20 THE COURT: Was it cash?

21 THE WITNESS: Yes, it was.

22 BY MR. DREYER:

23 Q Now, at the time you gave the -- strike that. Where
24 did you get the money from, Mr. Hauser?

25 MR. LOMBARDINO: I object.

1 THE COURT: Overruled.

2 BY MR. DREYER:

3 A I sold marijuana.

4 Q And how soon before you gave it to Mr. Blossy did you
5 accumulate the \$25,000?

6 MR. LOMBARDINO: I object.

7 THE COURT: Overruled.

8 BY MR. DREYER:

9 A It was over a period of about a year..

10 Q Now, when you sent Mr. Blossy to Arizona with the
11 \$25,000 -- strike that.

12 THE COURT: I do not think that is
13 what he said.

14 MR. DREYER: Pardon?

15 THE COURT: Did he say he sent him --

16 MR. DREYER: I just struck my question.

17 THE COURT: All right.

18 BY MR. DREYER:

19 Q And when you gave Mr. Andrew Blossy the money, did you
20 tell him for what purpose the money was being sent to
21 Arizona?

22 A No.

23 Q Did there come a time, prior to your sending the money
24 to Arizona, through Mr. Blossy, that you had a
25 conversation with anybody concerning the use of that

1 THE COURT: Overruled.

2 BY MR. DREYER:

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13 what he said.

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17 THE COURT: All right.

18 BY MR. DREYER:

19 Q And when you gave Mr. Andrew Blossy the money, did you
20 tell him for what purpose the money was being sent to
21 Arizona?

22 A No.

23 Q Did there come a time, prior to your sending the money
24 to Arizona, through Mr. Blossy, that you had a
25 conversation with anybody concerning the use of that

1 money?

2 MR. LOMBARDINO: Your Honor, I object
3 to the form of the question.

4 THE COURT: Read the question.

5 (The pending question was read back
6 by the Reporter).

7 THE COURT: Overruled.

8 MR. LOMBARDINO: Your Honor, I submit
9 there are two questions in one there.

10 THE COURT: Overruled. If he cannot
11 answer, he can tell us.

12 Would you repeat the question, please.

13 MR. DREYER: Let me rephrase the
14 question to save time.

15 THE COURT: All right.

16 BY MR. DREYER:

17 Q Prior to sending Andrew Blossy to Tucson, Arizona, or
18 Arizona, did you have a conversation with anyone
19 concerning the use of that money?

20 A I really don't remember in particular.

21 Q Prior to sending Mr. Blossy to Arizona, did you have
22 a telephone conversation with Mr. Cooney?

23 A Yes.

24 Q And can you tell us when that conversation took place?

25 A No, I can't.

1 Q Do you recall what you told Mr. Cooney?

2 A No, I can't.

3 Q To the best of your knowledge, did Mr. Cooney know
4 Mr. Blossy was going to be in Arizona?

5 MR. LOMBARDINO: I object to that,
6 your Honor. How could this witness possibly answer a
7 question like that as to someone else's state of mind?

8 THE COURT: All right. I sustain it,
9 but I think it can be developed other ways, to
10 keep it clear to the jury and me.

11 MR. DREYER: Your Honor, obviously
12 there are leading questions.

13 MR. RYAN: No statements.

14 THE COURT: I appreciate that, but just
15 ask the questions.

16 BY MR. DREYER:

17 Q Did there come a time, prior to you sending Andrew
18 Blossy to Tucson, when you spoke to Kevin Cooney on
19 the phone --

20 A Yes?

21 MR. LOMBARDINO: Your Honor, I am sorry.
22 I did not hear Mr. Dreyer's questions. He is a little
23 too close to the witness.

24 BY MR. DREYER:

25 Q Prior to your sending Andrew Blossy to Tucson, Arizona,

1 did you speak with Mr. Cooney on the phone?

2 A Yes.

3 Q Do you recall the conversation?

4 A No.

5 Q Do you recall mentioning Andrew Blossy to him?

6 A No.

7 Q Do you recall mentioning money to him?

8 A No.

9 Q Can you tell the members of the jury why you sent
10 \$25,000 to Kevin Cooney?

11 A It was being sent to buy marijuana for me.

12 MR. DREYER: Thank you. I have no
13 further questions, your Honor.

14 CROSS-EXAMINATION

15 BY MR. LOMBARDINO:

16 Q Mr. Hauser, prior to speaking with me this morning,
17 have you ever met and/or spoke with mr in your entire
18 life?

19 A No.

20 Q And, Mr. Hauser, you pleaded, did you nit, in this
21 particular case under Section 844B, do you recall
22 that?

23 A Yes.

24 Q And at the time you were represented by counsel, were
25 you not?

1 A Correct.

2 Q And were you told that the judgment of conviction would
3 would not be entered against you for a period to be
4 set by the court in the future, and that if you did
5 not violate any of the terms of the Probation
6 Department, this matter would be expunged?

7 A Yes.

8 Q Now, before coming to court and testifying today, Mr.
9 Hauser, were you told by someone that if you did not
10 come into court and testify, someone might put you in
11 jail?

12 A Yes.

13 Q And the last few days, have you been under an
14 emotional strain about the testimony?

15 A Yes, very much so.

16 Q Now, did you ever introduce Andrew Blossy to Kevin
17 Cooney?

18 A No.

19 Q And did Andrew Blossy ever tell you that he knew
20 Kevin?

21 A No.

22 Q And who bought the automobile that Mr. Blossy was
23 driving?

24 A I did.

25 Q And when you spoke to Mr. Blossy, did you ever tell

1 him the amount of money that was in the car?

2 A No.

3 Q Did you ever tell Mr. Blossy that he was going out
4 there to get marijuana?

5 A No.

6 Q Now, you testified that -- withdrawn. How long did
7 you have this car before Mr. Blossy drove it out to
8 Arizona?

9 A Oh, maybe two weeks.

10 Q To your knowledge, was there any -- was there ever a
11 quantity of marijauan in the back trunk of that
12 automobile?

13 A To my knowledge, there was nothing but two empty
14 suitcases in the trunk of that automobile.

15 Q Now, did you ever smell an odor of marijuana coming out
16 of the back trunk of that automobile?

17 A No.

18 Q And these suitcases that you have told us about, did
19 they bear any initials?

20 A No.

21 Q And if someone testified in this Courtroom that those
22 suitcases had initials on them, would that be
23 inaccurate?

24 A They were lying.

25 Q Now, at the time when you gave the telephone number of

1 Kevin to Blossy, did you know what Kevin Cooney was
2 doing in the State of Arizona?

3 A He was going to law school.

4 Q And did you tell Mr. Blossy that, "On the way, if you
5 should have a problem, if you should break down, call
6 this friend of mine, Kevin Cooney"?

7 A Yes, he was told to either call him or call me.

8 Q Now, did you ever tell Blossy that when he gets to
9 Arizona, he should meet with Kevin Cooney?

10 A No.

11 Q Did Blossy ever know -- withdrawn. Did you ever tell
12 Blossy who he was going to meet when he got to
13 Arizona?

14 A No.

15 Q As a matter of fact, Mr. Blossy -- withdrawn. Do
16 you know how Mr. Blossy returned from Arizona to the
17 State of New York?

18 A I believe he took a bus. I picked him up at the bus
19 station.

20 Q Okay. Was he originally, pursuant to your conversa-
21 tion with Blossy, was he originally to come back by bus?

22 A No.

23 Q Was he going to drive back a load of marijuana?

24 A No.

25 Q How was he going to come back?

1 A He was going to get on the next airplane and fly back.

2 Q And do you know whether or not he had either an air-
3 line ticket to return or funds to return?

4 A He had funds.

5 Q And did Kevin Cooney give him the money to return?

6 A No.

7 Q Who gave him the money to return?

8 A I did.

9 THE COURT: I am not clear on this and
10 I think I should try to clarify it mainly for the
11 jurors.

12 Did you testify you gave \$25,000 to
13 Blossy?--

14 THE WITNESS: Correct.

15 THE COURT: -- in some form?

16 THE WITNESS: Correct.

17 THE COURT: And did you just hand it
18 to him in his hands?

19 THE WITNESS: No, I had it in the trunk
20 of the car.

21 THE COURT: Where?

22 THE WITNESS: In the trunk of the car.

23 THE COURT: Was this \$25,000 in cash in
24 the trunk?

25 THE WITNESS: Yes.

1 THE COURT: Open to be seen?

2 THE WITNESS: No, it was in a box
3 behind the spare tired.

4 THE COURT: And did Blossy know that?

5 THE WITNESS: He knew there was money
6 there, yes.

7 THE COURT: All right.

8 THE WITNESS: But he did not know how
9 much.

10 THE COURT: So what was to be done with
11 the car when it got out to Arizona?

12 THE WITNESS: He was to leave it and
13 come home.

14 THE COURT: Where, did you tell him?

15 THE WITNESS: That was up to him.

16 BY MR. LOMBARDINO:

17 Q Now, his Honor asked you about the money, the money
18 that you put in the back of this car. Was it ever
19 discovered and shown to Blossy?

20 A No.

21 Q So that Blossy did not know if there was \$25,000 there
22 or 25 cents there, wouldn't that be a fair statement,
23 Mr. Hauser?

24 A That would be correct.

25 Q And did Mr. Blossy tell you he had been arrested?

- 1 A Yes.
- 2 Q And how long -- withdrawn. Do you know the state he
3 was arrested in?
- 4 A New Mexico.
- 5 Q And how long did he stay in New Mexico after he was
6 arrested, if you know?
- 7 A I believe it was a day or two.
- 8 Q And did he ever tell you he escaped from the
9 authorities in New Mexico?
- 10 A He told me they let him go.
- 11 Q And did he tell you whether or not he ever spent one
12 minute in a county jail?
- 13 A He said no.
- 14 Q Did he tell you where he stood?
- 15 A They sent him for a motel and they told him they
16 would pick him up and they never showed.
- 17 Q Mr. Hauser, do you know any of the defendants at this
18 table?
- 19 A Yes.
- 20 Q How many of them do you know?
- 21 A Three.
- 22 Q And would it be fair to say that of the three
23 defendants, you know them socially? --
- 24 A Yes.
- 25 Q And who would those three people be?

1 A Mr. Levy, Mr. Lefebvre and Mr. Cooney.

2 Q And Mr. Kay you do not know at all?

3 A Never met the man.

4 THE COURT: Who are they again, tell
5 the jury?

6 THE WITNESS: Mr. Cooney, Mr. Lefebvre
7 and Mr. Levy.

8 BY MR. LOMBARDINO:

9 Q Incidentally, these suitcases that were in the car,
10 did you do anything in regard, or with relation
11 to these suitcases before the car was driven out
12 there?

13 A Yes.

14 Q I would like you to tell his Honor and the jury what
15 did you do?

16 A I took them outside and I shook them out and I took
17 a vacuum cleaner and vacuumed the insides of the suit-
18 cases.

19 Q And when you were doing this, did you leave two ounces
20 of marijuana in that suitcase?

21 A That is totally impossible.

22 Q Sir?

23 A Totally impossible.

24 Q And was there an odor coming from the suitcases?

25 A As far as I know, no.

1 THE COURT: When did you last see the
2 car and the suitcases?

3 THE WITNESS: The day Mr. Blossy left.

4 THE COURT: When he left?

5 THE WITNESS: Right.

6 THE COURT: Ithaca?

7 THE WITNESS: Right.

8 THE COURT: Did you see him after that?

9 THE WITNESS: No.

10 THE COURT: All right.

11 BY MR. LOMBARDINO:

12 Q So the very day that Blossy drove the car you looked
13 at those suitcases and there was no odor in the car
14 and there was no residue in the suitcases?

15 A That's correct.

16 Q Do you know whether or not Mr. Blossy met with anyone
17 from the time he left you until the time he was
18 stopped in New Mexico, do you know?

19 A As far as I know, no.

20 Q And when you spoke to Mr. Blossy upon his return, did
21 he ever tell you he spoke one word to Mr. Cooney?

22 A He said he didn't.

23 Q And did he ever tell you he ever saw Mr. Cooney,
24 either in New Mexico or in Arizona?

25 A No, he didn't.

1 MR. LOMBARDINO: Your Honor, I have no
2 further questions.

3 THE COURT: Mr. Lebetkin?

4 MR. RYAN: Could we have a short
5 conference of counsel? We do not want to hold things
6 up here, but if we may, it might shorten it up. The
7 jury can stay here. We will just step outside for a
8 second. Bear with us.

9 MR. LOMBARDINO: Your Honor, could the
10 defendants come with us?

11 THE COURT: Yes, that is all right.
12 Do not be too long now.

13 MR. LEBETKIN: I believe it will
14 expedite matters, Judge.

15 (Defendants and attorneys step outside
16 Courtroom for conversation).

17 (Jury stays in Courtroom).

18 (Defendants and attorneys re-enter
19 Courtroom).

20 MR. LOMBARDINO: Thank you for your
21 indulgence, your Honor. Thank the jury for their
22 indulgence.

23 MR. LEBETKIN: Thank you.

24 THE COURT: All right. Mr. Lebetkin,
25 it is your examination.

1 MR. LEBETKIN: I have no questions.

2 THE COURT: No questions. All right,

3 Mr. Leone?

4 MR. LEONE: On behalf of John Lefebvre,

5 I have no questions.

6 THE COURT: Mr. Ryan?

7 CROSS-EXAMINATION (continued)

8 BY MR. RYAN:

9 Q Did I understand you to say that you do not know
10 Bruce Kay?

11 A That's correct.

12 Q Did anyone ever mention the name Bruce Kay to you?

13 A No, never.

14 Q And I understood you to say that you had the conversa-
15 tion with Mr. Blossy in the Ithaca area?

16 A That's correct.

17 Q And you spend most of your time in the Ithaca area?

18 A That's where I live.

19 Q You live there?

20 A Up until four months ago.

21 Q And the marijuana you sold, you sold in the Ithaca
22 area?

23 A Totally.

24 Q Nothing to do with Albany, did it?

25 A Not -- I have been in Albany once in my life before

1 this.

2 MR. RYAN: Thank you. No further
3 questions.

4 MR. DREYER: Nothing on redirect.

5 THE COURT: All right. Thank you.

6 (Witness excused).

7 THE COURT: Next witness?

8 MR. DREYER: We will ask that the
9 witness be excused from the Courtroom, your Honor.

10 THE COURT: All right.

11 MR. DREYER: The Government calls
12 Charles Ring.

13 CHARLES RING,
14 having been called as a witness in behalf of
15 the Government, was first duly sworn according to
16 law and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. DREYER:

19 Q Mr. Ring, what is your occupation?

20 A I am a sergeant with the New Mexico State Police
21 Narcotics Division.

22 Q Where are you employed?

23 A Las Cruces, New Mexico.

24 Q How long have you been employed with the New Mexico
25 State Police?

1 A Shortly over 12 years, sir.

2 Q What are your duties as a police officer with the New
3 Mexico State Police?

4 A I am a first-line supervisor, supervising five
5 narcotics agents in an area, a four-county area, in
6 the southwestern part of New Mexico.

7 Q Do you recall September 1974?

8 A Yes, sir, I can.

9 Q Were you so employed in September 1974?

10 A Yes, sir, I was.

11 Q What were your duties in September 1974?

12 A Basically the same.

13 Q Now, I direct your attention to September 27, 1974.

14 Do you recall that date?

15 A Yes, sir, I do.

16 Q Did there come a time, on September 27, 1974, when you
17 responded to a call?

18 A Yes, sir.

19 Q Do you remember from whom the call came?

20 A Yes, sir.

21 Q Who?

22 A From Sergeant Robert Tripeer.

23 Q And when did you receive that call?

24 A Approximately 1:45 p.m. on September 27.

25 Q In response to that call what, if anything, did you

do?

A I was advised -- Sergeant -- that Sergeant Tripeer requested my assistance at that time about a half mile south of the Dona Ana County and Sierra County line on Interstate 25.

Q Did you go to that location?

A Yes, I did.

Q What, if anything, did you see when you arrived?

A I saw Sergeant Tripeer, Officer Veramontes, a gentleman later identified as Andrew Blossy, and evidence which --

Q Well, did you observe --

MR. LOMBARDINO: I object.

THE COURT: Sustained.

BY MR. DREYER:

Q Did you observe an automobile?

A Yes, sir, I did.

Q What did you observe?

A I observed a 1971 green Chevrolet with California registration plates.

Q Did there come a time when you examined the automobile?

A Yes, sir.

Q What did you find?

A I found several items in the vehicle, some behind the

1 front seat in the floor board I believe there were
2 two air shocks, also in the trunk of the vehicle there
3 was a green suitcase of a folding type and a violet
4 suitcase of the same type.

5 Q Could you keep your voice up?

6 MR. LOMBARDINO: Your Honor, would the
7 witness speak a little louder?

8 BY MR. DREYER:

9 A A violet suitcase of the folding type and also a green
10 suitcase of a folding type, and \$25,450 in United
11 States currency.

12 Q And where was the money?

13 A It was in the green suitcase and it was contained
14 within a small cardboard box and an envelope.

15 Q Now, what, if anything, did you do with the items that
16 you observed?

17 A I inventoried the items and took them to the New
18 Mexico State Police office in Las Cruces.

19 Q Did there come a time when you spoke to the individual
20 you identified as Andrew Blossy?

21 A Yes, sir, there did.

22 Q Would you tell us what Mr. Blossy said? Did there
23 come a time when you received something from Mr.
24 Blossy?

25 A Yes, sir.

1 Q What did you receive?

2 A Certain information regarding telephone numbers and --

3 Q Did Mr. Blossy show you anything?

4 A Yes, he did.

5 Q What did he show you?

6 A He showed me a slip of paper.

7 Q And did you observe the slip of paper?

8 A Yes, I did.

9 Q What, if anything, did it have written on it?

10 A It had a telephone number in Tucson, Arizona written
11 on it.

12 Q Did it have any names next to it?

13 A I can't recall the name, sir.

14 Q Did there appear anything else on the slip of paper?

15 A Not that I can recall.

16 Q Now, what, if anything, did you do with Mr. Blossy
17 after he gave you the slip of paper?

18 A At that point, Mr. Blossy stayed there --

19 MR. LOMBARDINO: I object.

20 MR. DREYER: May we have a ground.

21 THE COURT: Overruled. I will allow it

22 MR. RYAN: Excuse me. This is --

23 MR. LOMBARDINO: This is a conversation

24 now, with Mr. Blossy. I respectfully submit that is

25 pure hearsay.

1 MR. DREYER: I am not eliciting the
2 conversation.

3 MR. LOMBARDINO: Mr. Dreyer, please,
4 the sergeant --

5 THE COURT: Wait a minute. Do not get
6 too upset about it until he starts to ask it. You do
7 have to restrict him to what he actually saw him
8 do, that is right.

9 MR. DREYER: That is right. I am not
10 going to ask as to a conversation.

11 MR. RYAN: No objection.

12 BY MR. DREYER:

13 Q What, if anything, did you do with Mr. Blossy after
14 you received the slip of paper?

15 A I didn't do anything with Mr. Blossy.

16 Q Did there come a time when you took him someplace?

17 A Yes, sir.

18 Q Where did you take him?

19 A I took him to a motel room.

20 MR. LOMBARDINO: Where?

21 THE WITNESS: A motel room.

22 BY MR. DREYER:

23 Q And do you recall the name of the motel?

24 A I believe it was the Bruce motel. However, I am not
25 sure, sir.

1 Q Prior to doing that, did you take him anywhere else?

2 A No, sir.

3 Q Did there come a time when you took him to the
4 station?

5 A Oh, yes, sir.

6 Q When did you do that?

7 A After my arrival at the -- Sergeant Tripeer's
8 location, we all proceeded back to New Mexico State
9 Police office.

10 Q With whom did you go to the station?

11 A Myself and Agent Richard Moore of the Dona Ana County
12 Metro Narcotics Community.

13 Q After you took Mr. Blossy back to the station, did
14 there come a time when you asked assistance from
15 someone else?

16 A Yes, sir, there was.

17 Q From whom?

18 A From the Drug Enforcement Administration, Agents
19 Dave Alba and Jim Montagne.

20 Q Did there come a time when someone did respond to
21 your call for assistance?

22 A Yes, sir.

23 Q Who?

24 A No, sir, two gentlemen.

25 Q Mr. Montagne being one of them?

1 A Yes, sir.

2 Q Now, after Agent Montagne arrived what, if anything,
3 occurred?

4 A Agent Montagne placed a telephone call to a number
5 in Tucson, Arizona.

6 Q What number?

7 A The number that had been on the slip of paper that
8 Blossy showed to myself.

9 MR. LOMBARDINO: I object to any
10 conversations, your Honor.

11 MR. DREYER: We are not going to get
12 into conversation.

13 THE COURT: This was in your
14 presence, Sergeant, the telephone call was made?

15 THE WITNESS: Yes, sir.

16 BY MR DREYER:

17 Q Would you describe the phone apparatus used to make the
18 phone call?

19 A Yes, sir. It was a regular telephone with a loud
20 speaker attachment.

21 Q And who was in the room where the phone call was made?

22 A Mr. Blossy, Agent Alba, Agent Montagne and myself.

23 Q And did you hear any conversation?

24 A Yes, I did.

25

MR. RYAN: Excuse me. I must object on

* * *
MR. DREYER: Yes.

THE COURT: All right. Thank you,
Sergeant.

All right, we will take our luncheon recess early. We will start again at 1:15. Ladies and gentleman, remember my instructions. Do not talk to anybody about the case.

(Whereupon at this time, the jury left the Courtroom).

MR. LEBETKIN: Now that Mr. Hauser's testimony has been concluded, I must respectfully now ask your Honor to strike that testimony given by Mr. Kates or Katz, and Mr. Moscovitz, of the alleged conversations that they each had with Mr. Harold Levy, Jr., the -- a defendant in this case, with respect to the \$25,450 and his participation in the loss, for the reason that I respectfully submit, in my humble opinion; Judge, that it is now apparent that Mr. Hauser was not connected in a criminal matter with any of the people charged in this indictment at this table, and that he did not know them except socially. That was not all of them either. And that it would not then fit in under the case law for the statute with respect to a spoke or wheel or chain conspiracy. And that now that there will never be a foundation laid in this

1 case, with respect to that part of the alleged
2 conspiracy, the testimony by Kates and Moscovitz,
3 which was hearsay, does not now fall within the
4 exception to the hearsay rule under the conspiracy
5 law and for that reason, I ask your Honor to strike
6 the -- this record.

7 MR. RYAN: I join that.

8 THE COURT: Motion denied.

9 MR. RYAN: I join on the motion and
10 that it is unrelated to the conspiracy on trial on
11 Bruce Kay.

12 MR. LOMBARDINO: I make the same
13 motion on behalf of Cooney.

14 MR. LEONE: I make the same objection
15 on behalf of Lefebvre.

16 THE COURT: Motion denied.

17 MR. LEBETKIN: Respectfully exception.

18 THE COURT: How many more witnesses
19 for the Government?

20 MR. DREYER: One witness and then
21 perhaps we should have a stipulation conversation or
22 something.

23 MR. LOMBARDINO: After lunch, who do
24 you have, Montagne coming up?

25 MR. DREYER: Yes, Montagne could be the

1 rest of the afternoon.

2 (A luncheon recess was taken).

3 (Trial resumes).

4 THE COURT: All right. Call your
5 witness.

6 MR. DREYER: The Government calls James
7 Montagne.

8 JAMES MONTAGNE,
9 having been called as a witness in behalf of
10 the Government, was first duly sworn according to
11 law and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. DREYER:

14 Q Mr. Montagne, what is your occupation?

15 A I am a special agent with the U. S. Drug Enforcement
16 in Las Cruces, New Mexico.

17 Q Drug Enforcement Administration is referred to as
18 D.E.A., is that correct?

19 A Yes, it is.

20 Q How long have you been a D.E.A. agent?

21 A Approximately five years.

22 Q And how long have you been stationed in New Mexico?

23 A In New Mexico about two-and-a-half years.

24 Q Where is your duty station in New Mexico?

25 A Now it's in Las Cruces, New Mexico. Previous to that,

1 about two months, it was in Deming, New Mexico,
2 New Mexico, which is about 60 miles away.

3 Q What are your duties as a D.E.A. agent, very briefly?

4 A I am a special agent. I make narcotics-type cases.

5 Q Directing your attention to September 1974, do you
6 recall that month and year?

7 A Yes, I do.

8 Q Where were you stationed at that time as a D.E.A.
9 agent then?

10 A In Deming, New Mexico.

11 Q I direct your attention to September 27, 1974. Do
12 you recall that day?

13 A Yes, I do.

14 Q Did there come a time when you responded to a call
15 for assistance?

16 A Yes, Sergeant Charles Ring of the New Mexico State
17 Police called me on that afternoon.

18 Q And after you received his call what, if anything, did
19 you do?

20 A I went to Las Cruces, New Mexico.

21 Q And specifically where?

22 A To the State Police office in -- State Police
23 Narcotics office in Las Cruces.

24 Q About what time did you arrive?

25 A Approximately 3:30 or 4:00 o'clock.

1 Q Who was present when you arrived, Mr. Montagne?

2 A Sergeant Ring was there and there was a man there
3 named Andrew Blossy.

4 Q Now, did you meet Mr. Blossy?

5 A Yes, I did.

6 Q did you meet with Mr. Blossy in the presence of Mr
7 Ring?

8 A Yes, I did.

9 Q Did there come a time when you received something
10 from either Mr. Ring or Mr. Blossy?

11 MR. LEONE: Objection on behalf of
12 Mr. Lefebvre since there is no testimony he was
13 present at this particular time.

14 MR. LEBETKIN: I make that objection.

15 MR. RYAN: I make objection.

16 THE COURT: My ruling is the same with
17 the same cautionary instruction.

18 BY MR. DREYER:

19 Q Did there come a time when you received something
20 from either Mr. Ring or from Andrew Blossy?

21 A Yes. It was a piece of paper with two telephone
22 numbers.

23 Q From whom did you receive it?

24 A From Mr. Ring.

25 Q And did you look at the paper?

1 A Yes, I did.

2 Q Do you recall what was on the paper?

3 A Yes, it was two telephone --

4 Q Speak up, please. Keep your voice up.

5 A It was two telephone numbers, one with the name Kevin
6 by it and the other with the name Mike or Michael by
7 it.

8 Q And what did you do with that slip of paper?

9 A I -- well, I noted the telephone numbers --

10 Q Do you mean you noted -- did you do something with the
11 paper?

12 A Yes, I took a piece of paper and I wrote numbers down
13 and the names off the piece of paper.

14 Q What did you do with the paper?

15 A I believe I either took it with me --

16 Q I cannot hear you. What did you do with the paper?

17 A The paper. When I left there, I think I took it with
18 me and destroyed it later after I had put the numbers
19 into a report.

20 MR. LOMBARDINO: Your Honor, what did
21 he do with the paper? He is dropping his voice.

22 THE WITNESS: I am sorry.

23 THE COURT: He destroyed it. But keep
24 your voice up.

25 THE WITNESS: Yes, sir.

1 BY MR. DREYER:

2 Q Did you do something with the numbers that you
3 recorded yourself?

4 A Yes, I determined that I would call the number in
5 Tucson.

6 Q Did you wrote that number down?

7 A Yes, I did.

8 Q And did there come a time when you inked that number
9 into your own report?

10 A Yes.

11 Q What was the date of your report?

12 A October 4, 1974.

13 Q Do you now independently recollect the number that
14 you wrote down?

15 A Yes, the number by the name Kevin was 602-881-0366.

16 Q Did you refresh your recollection prior to coming here
17 today?

18 A Yes, I did.

19 Q With what?

20 A My report.

21 Q Now, after you met with Mr. Blossy, did there come a
22 time that you did something at the station in Las
23 Cruces?

24 A Yes, I called the number 602-881-0366.

25 Q Who was present when you made that call?

1 A Chris, a female voice.

2 Q No, who was present in the station?

3 A Oh, I am sorry. Sergeant Ring and Mr. Blossy. D.E.A.
4 agent Alda, other police officers.

5 Q Did he accompany you to the station?

6 A Yes.

7 Q What kind of an apparatus did you use to make the
8 call?

9 A It was a telephone with a loud speaker on it so that
10 everyone in the room could hear the call.

11 Q Was there a tape recorder used?

12 A Yes, there was.

13 Q Now, will you tell the members of the jury what
14 happened when you had dialed the number?

15 A I dialed that number and a female voice answered. I
16 identified myself as Andrew Blossy. The female
17 voice --

18 MR. LOMBARDINO: I object.

19 THE COURT: What grounds?

20 MR. LOMBARDINO: That it is hearsay,
21 your Honor. I object on the ground it is hearsay.
22 I object on the ground there has been no proper
23 identification to formulate an opinion as to who he
24 was speaking with.

25 THE COURT: Overruled.

1 A (Continuing) -- The female voice identified herself
2 as Chris. I identified myself as Andrew Blossy.

3 Q When you identified yourself as Andrew Blossy what,
4 if anything, did the female voice say?

5 A The female voice said, "Kevin has been waiting for
6 you and where are you?" I said that my car had broken
7 down and I was in Las Cruces, New Mexico. I said --
8 I asked her if Kevin was there and she said he wasn't
9 there right now but that he would be back in a little
10 while.

11 Q Is there any other conversation in that phone call
12 that you recall now?

13 A Not that I recall right now.

14 Q What happened?

15 A I waited about --

16 Q Did you hang up?

17 A Yes, I hung up.

18 Q Then what happened?

19 A I waited about a half hour or 45 minutes.

20 Q At the station?

21 A Yes.

22 Q Continue.

23 A And I called the same number. A female voice again
24 answered, Chris, identified herself as Chris.

25 Q Who was present when you made the second phone call?

- 1 A Sergeant Ring and, I believe, essentially the same
2 people that were there in the first one.
- 3 Q All right. Continue.
- 4 A I asked if Kevin was there yet and she said, "No, but
5 he should call back in about an hour."
- 6 Q What did you do after that?
- 7 A I hung up. Then I returned to Deming, New Mexico.
- 8 Q How far is Deming from Las Cruces.
- 9 A Sixty miles.
- 10 Q Did you go back to Deming with someone?
- 11 A With David Alba, D.E.A. Agent Alba.
- 12 Q And where did you go?
- 13 THE COURT: Keep your voice up.
- 14 BY MR. DREYER:
- 15 Q Where did you go in Deming?
- 16 A I went back about -- it was about eight o'clock. I
17 believe I went into the D.E.A. office in Deming and
18 I called the number again.
- 19 Q Who was present when you made this phone call?
- 20 A Kevin was there.
- 21 Q Who was present in your office?
- 22 A Oh, I am sorry, I was alone at that time.
- 23 Q What did you do?
- 24 A Pardon?
- 25 Q Did you make a phone call?

1 A Yes, I did.

2 Q Describe the phone apparatus.

3 Q It was -- I used a tape recorder which I plugged in
4 and it was one with a suction cup which goes on the
5 phone receiver.

6 Q And did you place a call?

7 A Yes, I did.

8 Q To what number?

9 A 602-881-0366.

10 Q What happened after you dialed that number?

11 A A man was there who identified himself as Kevin.

12 Q Did you say something to him at that time?

13 A Yes, I identified myself as Andy Blossy. He
14 identified himself as Kevin. I said that my car had
15 broken down in Las Cruces and I wanted him to come
16 and pick me up.

17 Q What did he say?

18 MR. LOMBARDINO: Your Honor, I am
19 going to object to what he said.

20 THE COURT: What is your ground? You
21 should be specific.

22 MR. LOMBARDINO: Sir?

23 THE COURT: You should be specific
24 about your ground.

25 MR. LOMBARDINO: I will be, your Honor.

1 The grounds are that there has not been a proper
2 foundation laid at this particular point as to who
3 this man was talking to I submit to you, your
4 Honor, that it is elementary that there has to be a
5 foundation showing the person who is on the other
6 end of that phone.

7 THE COURT: What is your response?

8 MR. DREYER: The response is that we
9 have already heard testimony from Mike Hauser who
10 said he gave a slip of paper to Andrew Blossy
11 with Kevin Cooney's phone number on.

12 MR. LOMBARDINO: Your Honor, I submit
13 that is not a proper foundation for voice identifica-
14 tion.

15 THE COURT: I think it is competent.

16 I will allow it. Overruled.

17 BY MR. DREYER: MR. DREYER: Now after this person

18 Q Now, after this person identified himself and you told
19 him that you had broken down in New Mexico what, if
20 anything, did he say?

21 A He told me that he wasn't going to come over to New
22 Mexico but he told me to take a bus, I believe. I
23 said I didn't want to take a bus and he told me to
24 take some of the money and get the car fixed and bring
25 it on over but get the money over there.

1 Q Did your conversation continue?

2 A Yes. I said that I didn't want to move it and that
3 I wanted him -- I repeated that I wanted him to come
4 over and pick me up. He said no, he wouldn't do that
5 but to get the money over there. I then asked him if
6 I could drive the car back with the load for \$1,000.
7 I said, "Could I drive the car back with the load and
8 would you give me \$1,000?" He said, "Yes, of course."

9 Q Did he say anything else?

10 A I said would the load be ready to go right when I got
11 there, and he said that he would need the money first
12 and that it would take him a couple days to get the
13 load together.

14 Q And did you say anything in response to that?

15 A I said "All right," and I think I repeated that I
16 wanted him to come over and get me.

17 Q And what did he say?

18 A He refused again.

19 Q Did you give him any further information?

20 A Not that I can recall

21 Q Prior to calling, did you and Sergeant Ring have a
22 discussion concerning the lodging of Andrew Blossy at
23 a hotel?

24 A Yes, I gave him -- before I had left Las Cruces, I
25 went to the Economy Motel with Sergeant Ring and we

* * *

1 close of the Government case, they have also
2 established the corpus or the agreement that was not
3 done in this case. So that I most respectfully submit
4 that despite whatever your Honor may speculate on as
5 to what happened here, the Government has not proved
6 it and for that reason, your Honor, I most respect-
7 fully submit that the Government, having failed to
8 carry their burden, the indictment must fall.

9 Thank you.

10 THE COURT: All right.

11 Mr. Lombardino?

12 MR. LOMBARDINO: Your Honor, if it
13 please the Court, under Rule 29, on behalf of
14 defendant Cooney, I respectfully move to dismiss the
15 indictment on the ground that the credible evidence
16 that might be submitted to the jury is insufficient
17 as a matter of law to permit them to conclude or infer
18 guilt beyond a reasonable doubt and in addition there-
19 to, I respectfully submit that the indictment should
20 be dismissed based upon the proposition that the
21 only witness heard in this Courtroom testified in the
22 grand jury which led to the indictment of these
23 defendants was one Paul Moscovitz and no one else, and
24 I submit to you, through the direct examination and
25 the cross-examination, it is quite evident, your

1 Honor, that he did commit perjury and that he did
2 admit saying things in the grand jury that were
3 absolutely a lie, therefore rendering, at this point,
4 that indictment insufficient to go to the jury.

5 THE COURT: All right. Mr. Dreyer?

6 MR. LEBETKIN:--Excuse me, Judge, I am
7 sorry to interrupt, but I had intended to also mention
8 in my argument the fact that the conspiracy or
9 evidence of conspiracy, which was proved at this
10 trial if at all, is at variance with the conspiracy
11 which was charged in this indictment, that there may
12 have been some evidence indicating other conspiracies
13 or many conspiracy existed. They were not tied
14 together to that which was charged in the indictment,
15 nor did they fit into any rule of conspiracy whether
16 it be chain spoke, wheel or otherwise.

17 Thank you.

18 THE COURT: All right. Mr. Dreyer,
19 do you think you have proven a conspiracy with the
20 evidence so far?

21 MR. DREYER: Yes, your Honor.

22 THE COURT: All right. Tell me why?

23 MR. DREYER: Well, first of all, I want
24 to point out that in assessing the merits of the
25 motion to a judgment of acquittal, it is well settled

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1 accomplices and these accomplices have put each of
2 these defendants into this particular conspiracy.

3 Finally the independent evidence that
4 may be required in the State court, but certainly
5 is not required in the Federal court, but the
6 independent evidence certainly establishes the
7 existence of the conspiracy when, in September of
8 1974, police offices come into this case, make a
9 seizure of money and, through phone calls, through
10 records, established that Michael HaUser, Kevin
11 Cooney, Harold Levy, John Lefebvre, Bruce Kay were
12 members of a particular conspiracy.

13 So for that reason we respectfully
14 submit that the motion for judgment of acquittal
15 should be denied.

16 THE COURT: From my own recollection of
17 the evidence and then this review by the prosecution,
18 it is my judgment now, and I follow, of course, the
19 principle laid down in the Taylor case by Judge
20 Friendly, I think there is sufficient here, at
21 least, we do have credibility questions, but at
22 least there is sufficient here to overcome, at this
23 stage, the motions in regard to each of the defendants
24 and the evidence is sufficient direct and circum-
25 stantially, I believe, at this stage to prove that the

* * *

1 THE COURT: I will hold off on any
2 ruling.

3 MR. LOMBARDINO: Thank you.

4 MR. LEBETKIN: Thank you.

5 THE COURT: Bring the jury in.

6 (Jury enters Courtroom).

7 THE COURT: Good morning. We were
8 having legal discussions again, so that is the reason
9 you were kept out of the Courtroom. We are not
10 really trying to hide anything from you, but legal
11 problems are, as I told you, for the lawyers and
12 myself.

13 There is a stipulation to be read that
14 was offered as part of the Government's case. A
15 stipulation means it is an agreement by the attorney
16 or attorneys involved, so Mr. Dreyer, I believe, will
17 read the statement -- stipulation.

18 MR. DREYER: Yes. This is Government
19 Exhibit 6.

20 "The United States of America, by and
21 through its attorney and the defendants, by and
22 through their attorneys hereby stipulate and agree
23 that the custodian of report, Bell Telephone Company,
24 Tucson, Arizona, will call, be sworn as a witness in
25 the trial of above-entitled case. He will testify

1 what the business record shows, that on September 27,
2 1974, telephone number 602-881-0366 was listed under
3 the name of Christine Cooney, 2339 East Mainville,
4 Tucson, Arizona. Stipulation signed by each of
5 the attorneys present."

6 THE COURT: So I want you to know,
7 ladies and gentlemen, that is a stipulation about
8 that telephone number that I have been requested
9 and it is fair that I so instruct you. You should
10 draw no intimation at all or any concession at all
11 that that stipulation is an agreement by the attorney
12 for the defendant, that those telephone calls were
13 made as testified to by the agent Montagne yesterday,
14 that is a separate thing. The stipulation only
15 covers the listing of the telephone number and you
16 have to confine your judgment to that particular
17 phase of the stipulation.

18 MR. DREYER: The prosecution rests.

19 THE COURT: All right. We will take
20 the defendants now.

21 MR. LOMBARDINO: Your Honor, at this t
22 time I wish to offer, pursuant to an agreement with
23 Mr. Dreyer, at this time I respectfully move to offer
24 into evidence Defendants' Exhibit L and M heretofore
25 marked for identification now into evidence with the

* * *

K.C. Yeah, I understand.

P.M. And I can't see it. I'm sorry. I just can't - you know - I can't - I cannot go along with it and the whole reason - you know - I've been trying to think about this thing, about the thing, about it - you know - what position it puts me in and so on and that's when I came up with the thing that I was going to do what I was going to do - you know - and - uh - the whole idea what I'm really trying to work around is I have enough information so that your attorney - uh - can discredit me and discredit Meg. Okay?

K.C. Uh huh.

P.M. And I want to work with him so that he can do this, so that he can prove to the judge or to the jury or to whatever --

K.C. Uh huh.

P.M. That the original testimony in the Grand Jury was a lie. It was false and the indictment was no good.

K.C. Right.

P.M. See. That's what I wanta do. You know, I've discussed this - you know - with my attorney and discussing how to go about it and so on - you know - and as you know they can't produce Meg. They can't find her.

K.C. Yeah, right.

P.M. Yeah.

K.C. v You said that the other night. That sounds good to me.

P.M. Right. And they can't produce her and - you know - if I can give your attorney enough of - I . . . - can give, I know that I can give him enough information you see a secret informant they can read her testimony in court. She doesn't have to - she doesn't have to show up.

K.C. Right.

P.M. They, they - in fact her number is S.C.75005 and I'm S.C.75004 you know, that's how - that's how they refer to you when they read the testimony you know in court.

K.C. Huh.

P.M. Uh - and your attorney has the right to cross-examine the statement but he doesn't have the right to cross-examine Meg unless he produces enough information that - that shows some kind of doubt that her testimony is valid.

K.C. Huh.

P.M. In other words, they can go on just what she has down on paper.

K.C. Yeah. The statement alone that sucks yaa--

P.M. Right. And what I'm trying to do and I'm to - you know - go along with and help is to get that - you know - uh - just to prove that the whole thing is

just a crock of shit.

K.C. Huh.

P.M. Well, I know, I know I can do it. There's no problem-
uh - I - as soon as we sit down with your attorney,
there's no problem at all - uh -

K.C. Uh - you know - you know Paul, I mean I realize
this, you know. You've got me convinced that
that's all I can tell you and believe me, if Tony
was here, we'd be doing this today.

P.M. Yeah, well all I can say is that - you know - I'm
gonna let you go back to your motel and think about
it and whatever, but I'm sorry to say to you is that
if on one hand, you know - if you want good faith,
you know - I'm asking you - you know - I'm in a bind
right now. I'm asking you if you want - you know -
make the check out to the doctor - you know - mail
it special delivery so that I can - you know - take
care of the thing. You've got my word. I'm not
going to back out. I can't. I can't. It's too
important to me. In other words, I'm - my back's to
the wall again. I can't go any place else Kevin.
What I'm trying to say is - you know - uh - when I
leave - you also have to understand - when I leave
now if I do this - you know - I'm not even going to
be able to see my daughter any more.

P.M. I know and -

K.C. But it - uh - you know - I'll, I'll certainly admit though that after a while I just gave in and said, well, I guess he did it, you know.

P.M. Yeah, well of course. You have to. You know, after a while you had to, not knowing all of the information but you also have to look at the basis that here I am turning around now -

K.C. Yeah, I am.

P.M. You know - and here I am saying, look, I want to help you - you know - and I realize - you know - what could happen to me. I mean I - they could turn around and say, okay, but we'll hit him with a case of falsifying a testimony to the Grand Jury. I can do time for that.

K.C. Yep. I mean there's no question about it.' I mean, they can fuck you from a lot of angles.

P.M. Right, you know - so that's why - you know - uh - see when it gets down to the nitty-gritty and your attorney has to go to trial and they can't produce me and they can't produce Meg and you've got all this information man, they're going to look awful silly.

K.C. Yeah, they will.

P.M. Yeah -

K.C. No -

* * *
1 caught doing anything illegal.'

2 And Mr. Cooney says that what they
3 overlooked was that at this trial, there were other
4 people who were going to step out of the Indictment and
5 testify before you. There were other people who had
6 been subpoenaed to the Grand Jury, about which Moscovitz
7 knew nothing.

8 And when they had this conversation, that
9 is what they overlooked.

10 From Mr. Moscovitz' testimony it referred
11 to the evidence presented or represented by Michael
12 Hauser, Sergeant Pierce, and finally Agent Montayne.

13 Now, in this tape recording, Mr. Cooney
14 and Mr. Moscovitz very aptly pointed out , and Mr.
15 Cooney, you know, was a law student, and they pointed
16 out that there was no seizure in this case, which was
17 an apt observation. You know, there were no drugs and
18 no Marijuana. But they overlooked that the Government
19 was going to show a direct arrow, a direct arrow from
20 Michael Hauser, and his twenty-five thousand dollars
21 to Kevin Cooney. They overlooked that there was
22 going to be a direct arrow from the Ithaca operation
23 to Harold Levy in the Albany operation. They overlooked
24 that when they talked about that on the tape recording.

25 The testimony of Michael Hauser is very

1 simple, and needs not be belabored.

2 More importantly, you observed his
3 demeanor. . He was no volunteer. Do you recall Micahel
4 Hauser when he was one of the last witnesses to testify?
5 He told you that in September of 1974, he gave Andrew
6 Blobsly twenty-five thousand dollars and that the twenty
7 five thousand dollars had come from pot sales and that
8 the money was going to be sent to Kevin Cooney for more
9 pot.

10 He told you that he had given Andrew
11 Blobsly a slip of paper with two telephone numbers on
12 it, his own, and the name of Kevin Cooney.

13 You then heard from the Sergeant that
14 Blobsly was stopped on his way to Mexico, and he saw
15 air shocks and garment bags and the twenty-five thousand
16 dollars.

17 Then we moved on to the Sergeant and the
18 direct evidence and the twenty-five thousand dollars,
19 and then along with Agent Montayne who witnesses two
20 phone calls to the number on the slip of paper, which
21 were recorded on October 4th in the report by Agent
22 Montayne.

23 And thenumber turned out to be the number
24 of Kristine Cooney of Mable Street in Tucson, Arizona.

25 Now, after the Sergeant testified, Agent

1 Montayne took the stand and since he was the last witness,
2 you may recall his testimony.

3 He had three conversations. The first
4 conversation to the number that had been given him
5 by Andrew Blosbly, was answered by a female voice who
6 identified herself as Kris, and merely said that Kevin
7 was not there but that he would be back later.

8 The second phone call resulted in the
9 same conversation. And Mr. Montayne returned to
10 Deming, New Mexico, and that evening he tried for a
11 third time, and had a conversation with a man who
12 identified himself as Kevin. The testimony of Agent
13 Montayne now brings this case full circle, because
14 Agent Montayne told you, on direct examination, and
15 under heavy cross examination, that when he reached
16 Kevin, whose last name was unknown to him at the time,
17 that Kevin told him that he would be okay to drive a
18 load back, but that it would take a couple of days to
19 get the load; it was going to take a couple of days to
20 get it ready. That is the significance of that whole
21 conversation and nothing more.

22 But the important thing is that a few
23 days later, on October 4th, Mr. Montayne, Agent Montayne
24 wrote up a report and put that conversation in a report,
25 and filed it and that was the end of the case because

1 he thought it was unimportant, and he did not bother
2 to look at it again.

3 Montayne was heavily cross examined,
4 and no question about that. By painting a picture of
5 Montayne, as a shoddy investigator, and as a person
6 who lost tape recordings, on what might be an important
7 investigation, and Defense seeks to convince you
8 that his testimony is not to be believed.

9 Is there a logical connection between
10 losing tapes and credibility? He lost the tapes, and his
11 battery ran down. But, Ladies and Gentlemen, the
12 Defense argument overlooks three very important things:
13 first of all, that in early October, Agent Montayne
14 file his report. The significance of this report now
15 becomes clear, because at that time he wrote his report,
16 he did not know any other conspirators in this case,
17 and he did not know who Kevin Cooney was, and who
18 Harold I y was and he never heard of William Katz or
19 Paul Moscovitz or Marc Cohen, he never heard of them.

20 Other drivers told you the same thing,
21 that when they got to Tucson, it took a few days to
22 get the load ready. Does that coordinate with what
23 Mr. Montayne told you?

24 More importantly, the argument of the
25 Defense overlooks the fact that Michael Hauser testified

1 in this Courtroom, and that the registered number of
2 Kristine Cooney is in evidence, that the number that
3 you heard taken from Andrew Blosbly is the number of
4 Kristine Cooney. We know where the money came from,
5 and we know what it was from, the sale of Marijuana,
6 and we know where it was going, and we know for what
7 purpose it was going.

8 Even without Agent Montayne's testimony,
9 the corroborative evidence would be overwhelming with
10 regard to this transaction.

11 Ladies and Gentlemen, when Montayne
12 told you about the conversation, the modus operendi
13 in this case as reflected by that conversation and it
14 was exactly what Katz told you and what Moscovitz told
15 you.

16 You will recall that Moscovitz told
17 you that he went to Tucson in and around June, late
18 June of 1974, and that he waited around a few days,
19 and after a load was ready, he brought a load back.
20 Katz, of course, and Cohen, we have already summarized
21 in terms of their trips to Tucson.

22 But Ladies and Gentlemen, Montayne's
23 testimony, and the close of this line of testimony we
24 submit to you, that a conspiracy is clear. It is a
25 very pervasive conspiracy, but nevertheless, it was

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1 punishment or consequence is solely for the Court.

2 I charge you at this stage that if you
3 find the evidence with respect to the defendants not
4 sufficient to prove their guilt as to any, some or
5 all of them, beyond a reasonable doubt, then such
6 defendants or defendants should be found not guilty.
7 So if you find that the law as to any particular
8 defendant has not been violated, you should not
9 hesitate for any reason to render a verdict of not
10 guilty.

11 Equally so, I tell you that on the other
12 hand, if you find, in accordance with these
13 instructions, that the law has been violated by any
14 of the four defendants on trial as charged in this
15 one-count indictment, you should not hesitate to
16 render a verdict of guilty. Again, I remind you that
17 your verdict, guilty or not guilty as to each of the
18 four defendants, that is the way your verdict will be
19 taken from you by the Clerk, must be unanimous, the
20 12 of you must agree.

21 Now, it is the custom in our court, and
22 I think in other courts, they might do it differently,
23 but you should select a foreman from your own group
24 to speak for you and to announce the verdict or come
25 back to court if you have any questions. I know the

1 lawyers did talk to Mr. Chow as if he is already
2 elected foreman, but I will leave that up to the
3 democratic process of selection by the jury. I
4 remind you again that as far as exhibits, and I am
5 sure you will remember them, designate in writing
6 any exhibit that you want in your jury room.

7 So I think we are at the stage that
8 if the lawyers desire, they can so indicate where I
9 would take objections to my main charge, which means
10 I will excuse the jury from the room.

11 MR. RYAN: Can we have a moment on
12 that, Your Honor?

13 THE COURT: All right.

14 MR. RYAN: Judge, we do not want to
15 hold up the process here, but could we have a side
16 bar conversation with the bar?

17 THE COURT: I would rather have you
18 speak out. It is just a matter of letting the jury
19 out for 10 minutes or so.

20 MR. RYAN: It won't take more than 10
21 minutes. It will take five.

22 THE COURT: All right. Do you want me
23 to leave the jury here because I have requests yet
24 to cover and I am going to cover those.

25 MR. RYAN: All right. Then perhaps can

* * *

1 defendant is a member of another conspiracy, not
2 the one charged in the indictment, then you must acquit
3 that defendant. In other words, to find the
4 defendant guilty, we only have four of them here,
5 you must find that he was a member of the conspiracy
6 charged in the indictment beyond a reasonable doubt
7 and not some other conspiracy.

8 No. 7, the law does not compel a
9 defendant in a criminal case to take the witness
10 stand and testify and no presumption of guilt may be
11 raised and no inference of any kind may be drawn from
12 the failure of a defendant to testify. As stated,
13 and I think that I at least gave that inference to
14 you in my instructions, the law never imposes upon
15 the defendant in a criminal case the burden or duty
16 of calling any witnesses or producing any evidence.

17 No. 8, bear in mind, this is something
18 I told you, it would be a violation of your sworn
19 duty to base a verdict upon anything but evidence in
20 the case, if the accused, that means any of the four
21 defendants, if proven guilty, say so; if not proven
22 guilty, say so. Remember at all times that a
23 defendant is entitled to acquittal if any
24 reasonable doubt remains in your mind. Remember also
25 that the question before you can never be will the

* * *

1 you very much.

2 All right, thank you, ladies and
3 gentlemen, for your attention. I am going to swear
4 the marshals, I remembered it.

5 (Marshals sworn).

6 THE COURT: All right, you may retire,
7 ladies and gentlemen.

8 (Jury begins deliberations)

9 THE COURT: All right.

10 (Jury enters Courtroom).

11 THE COURT: All right, ladies and
12 gentlemen. Have you selected your foreman?

13 (Affirmative responses.)

14 THE COURT: Who shall speak?

15 VOICES: Mr. Chow.

16 THE COURT: He had a headstart in being
17 the foreman.

18 I have the note now, and I just wanted
19 to inquire, first have you made any decision yet as
20 to what particular exhibit you may want?

21 MR. CHOW: I guess, sir, we were
22 trying to find out if -- for instance, the exhibit and
23 also the testimony, we are merely in this stage, sir,
24 is just trying to find out availability. How readily
25 available are those materials if we are indeed, you

1 know, either at a later stage of the deliberations
2 we really need it. We are just asking the questions
3 ourselves.

4 THE COURT: Well, the note we have now
5 is about Robert Roth's testimony, and it is quite
6 extensive and I just wondered whether you have any
7 -- anything in mind about particular parts that you
8 could tell me that you are interested in. Otherwise
9 our court reporter is going to be reading testimony
10 for a long, long time.

11 MR. CHOW: We probably do not need that
12 extent, sir, but we were just merely exploring the
13 availability.

14 THE COURT: I cannot hear.

15 MR. CHOW: I said we were just in the
16 stage to ask ourselves this question, how readily
17 available are those materials, like the testimony, we
18 may not need it at all, sir.

19 THE COURT: Oh, I see. Well, the note
20 just said all the testimony and under a recent Court
21 of Appeals, Second Circuit, I have to bring you right
22 in when I get these notes, but maybe your lunch is
23 here and, of course, we are ready to go to lunch.
24 Maybe you can think about it and decide, the important
25 part is if you think you want testimony read back, is

1 to say, "We have this question in our mind. We would
2 like that particular phase, either the direct examina-
3 tion or cross, because to read it all back will take
4 a long time. So maybe while you have your lunch, you
5 can think about it and then if you think there is a
6 need to come back for any particular testimony, we
7 will bring you back in the Courtroom.

8 MR. CHOW: Sir, there was another
9 request made among the jurors, that is could we have
10 the charge against these defendants, the one you just
11 read?

12 THE COURT: You mean the instruction
13 I gave?

14 MR. CHOW: The indictment.

15 THE COURT: It is not all in written
16 form where I could give it to you for reading, but I
17 do have it if you think there is any particular parts
18 that you want amplified or clarified.

19 MR. DREYER: I think they mean the
20 indictment.

21 MR. CHOW: The indictment.

22 MR. LOMBARDINO: It is the indictment
23 Mr. Chow is speaking of.

24 MR. CHOW: Yes, the indictment.

25 THE COURT: All right. Ordinarily we

1 don't send it in, but anyway, I am going to excuse you now.
2 We will -- I will talk to the lawyers about those,
3 but make your minds up on any testimony you want read
4 as to any particular part. It may be that you want
5 it all read, but we will have to try to beat that.

6 All right, Mr. Lombardino, are you
7 going to speak for the group? Because ordinarily,
8 we send in the --

9 MR. LOMBARDINO: Your Honor, I would
10 prefer, and I do not know if I speak for the group,
11 I think I do, I would much prefer, your Honor, to
12 have, if your Honor will deohtaze, a re-reading of
13 the indictment rather than to have them take it in
14 there with them, and have them inspect it or examine
15 it for any length of time. I feel it is not an
16 exhibit in evidence. I have no objection to your
17 Honor reading it to them again, but I think there
18 could be grave dangers about them taking it in there
19 and attempting to construe certain technical terms
20 that might exist in the four corners of the indictment
21 and I know of no authority which permits them to take
22 the indictment and consider it as an exhibit.

23 THE COURT: Well, it used to be my
24 practice never to send it in, but I believe there is
25 authority now, and it authorizes the sending in of the

1 indictment.

2 MR. LOMBARDINO: But I submit, your
3 Honor, that is discretionary with the Court.

4 THE COURT: It can be, but I think it
5 has been upheld in the Court of Appeals.

6 Mr. Ryan, do you know -- you know from
7 your own practice.

8 MR. RYAN: Judge, I would ask your
9 Honor to exercise your discretion in not giving them
10 the indictment for the following reasons: Number one,
11 the indictment has to be somehow excised because
12 there are several subsequent counts in the indictment.
13 Number two, there are 17 defendants named in this
14 indictment and there are four on trial, and then what
15 happened with some of the defendants on pleas of
16 guilty and the fear I have is that when they get an
17 indictment with 17 defendants in, they may be saying
18 to themselves, you know, "All these other people have
19 been disposed of. That is in the exhibit, Roth's
20 application." The inferences were only down to the
21 last four who have not pleaded guilty. And then the
22 third reason is that it is undisputed from the
23 Government's point of view, they concede that there
24 are overt acts in that indictment that mention
25 Bruce Kay for which there is no evidence in this case

1 and that is the reason they gave your Honor the
2 modified indictment with the two overt acts and they
3 are going to take that indictment in and mention as to
4 Bruce Kay, a couple of overt acts, and the Government
5 concedes there is no proof to support those two
6 acts.

7 THE COURT: I do not want to put you
8 on the spot, but of course in eriminal cases in the
9 Eastern District --

10 MR. RYAN: Yes.

11 THE COURT: -- did the Judge ever
12 send the indictment in?

13 MR. RYAN: I must say I do not recall.
14 I have never seen it submitted. I have seen it read
15 and I have not seen it -- I have heard judges read
16 the indictment to them a couple of times, but I do not
17 recall, Judge, and I say this with all sincerity, and
18 I know I --

19 THE COURT: It depends on the individual
20 Judge, but I do think some judges now are sending the
21 indictment in, but I will reserve on it and I probably
22 bring them bafk and just read it.

23 MR. LOMBARDINO: Thank you.

24 MR. RYAN: Thank you.

25 There was another question that the

1 foreman mentioned, the availability of exhibits, and I
2 do not think we really gave them a direct answer.
3 The exhibits are here and they can take them into the
4 jury room whenever they want... They raised the
5 question about the availability of exhibits and I do
6 not think we really had an opportunity to answer them.
7 The answer, of course, is yes, they are here and you
8 can take them into the jury room.

9 THE COURT: We want them to designate
10 first.

11 MR. RYAN: Designate which exhibits
12 but he wanted to know the availability of
13 this kind of stuff. That is what I understood his
14 question to be.

15 THE COURT: All right. We will all
16 come back at quarter after 1:00. We will go to
17 lunch.

18 (A luncheon recess was taken).

19 (Trial resumes).

20 THE COURT: I want to make sure, are all
21 the defendants here?

22 MR. RYAN: Yes, your Honor.

23 THE COURT: All counsel are here?

24 MR. RYAN: Yes, your Honor.

25 THE COURT: All right. Bring the jury

1 in.

2 MR. LOMBARDINO: Is there another
3 note, your Honor?

4 THE COURT: Yes.

5 (Jury enters Courtroom).

6 THE COURT: All right. Mr. Chow, I
7 have the note and the first thing you asked for is the
8 amended application of Robert Roth to the Florida Bar.
9 I assume that the attorneys know what exhibits that
10 is.

11 MR. LOMBARDINO: Yes.

12 MR. RYAN: "V" as in Victor.

13 THE COURT: And No. 20 is indictment
14 handed down from grand jury. So it is my custom
15 just to read the indictment. I do not send the
16 indictment in itself. I will re-read it to you.

17 "The grand jury charges that from about
18 the month of July 1972 through the month of
19 June 1975, at or near Albany in the State and
20 Northern District of New York and elsewhere, Kevin T.
21 Cooney, Harold J. Levy, Jr., Christine H. Cooney,
22 Sandra Brookes, also known as Sandra Brookes Levy,
23 William Katz, they called him Kates at times, John
24 Lefebvre, Ellen Kaplan, Sandra L. Hunt, Marc Cohen,
25 Bruce Kay, Curtis Ponzi, John Tibbetts, Michael

1 Hauser, Ralph Click, Robert Roth, Michele Koven,
2 and Kathi A. Hesson, the defendants herein and diverse
3 other persons whose names are known and unknown to
4 the grand jury? -- as I told you, here is the
5 charge -- "did wilfully, knowingly and unlawfully
6 combine and conspire, confederate and agree together
7 and with each other to commit an offense against the
8 United States, to wit: To violate Title 21, United
9 States Code, Section 841A1. That the object and
10 purpose of the said unlawful combination, conspiracy
11 and agreement was to wilfully, knowingly, intentional-
12 ly and unlawfully distribute a Schedule 1 controlled
13 substance, to wit: Quantities of marijuana. That
14 in furtherance of the aforesaid combination,
15 conspiracy and agreement and to effect the objectives
16 thereof, the defendants, at the time and places here-
17 inafter named, did do and perform the following overt
18 acts."

19 I am going to read the overt act to
20 you. If there is no evidence about any particular
21 overt act, as I told you, just disregard it. You have
22 to have proof beyond a reasonable doubt that one of
23 these overt acts that is alleged in this indictment
24 did take place or that an overt act, that means
25 something that put the conspiracy into operation and

1 not named in this indictment, did take place, so any
2 names in here that are not proven to your satisfaction
3 beyond a reasonable doubt you should disregard this
4 allegation because it is only a writing, as I said.

5 "First, on or about July 17, 1972,
6 at or near Latham in the State and Northern District
7 of New York, Marc Cohen, a defendant herein,
8 delivered to Harold J. Levy, a defendant herein,
9 approximately 350 pounds of marijuana.

10 "Two, on or about April 15, 1973, at
11 or near Latham in the State and Northern District
12 of New York, William Katz-or Kates, Ellen Kaplan,
13 Harold J. Levy, Jr., John Lefebvre and Bruce Kay,
14 defendants herein, possessed with intent to distribute
15 approximately 300 pounds of marijuana.

16 "Three" -- and the dates are important
17 to connect with the evidence as you recollect it --
18 "on or about August 6, 1973, Bruce Kay, a defendant
19 herein, at or near Crescent in the State and Northern
20 District of New York, delivered approximately 300
21 pounds of marijuana to Harold J. Levy, Jr., William
22 Katz and others.

23 "Four, on or about June 21, 1974, at
24 or near Tucson, Arizona, Kevin T. Cooney and Christine
25 H. Cooney, defendants herein, caused to be delivered

1 to Harold J. Levy, Jr. at or near Crescent in the
2 State and Northern District of New York, approximate-
3 ly 300 pounds of marijuana.

4 "Five, on or about November 16, 1974,
5 Christine H. Cooney and Sandra L. Hunt, defendants
6 herein, at or near Crescent in the State and Northern
7 District of New York, delivered approximately 400
8 pounds of marijuana to Harold J. Levy, Jr., defendant
9 herein."

10 Now, I caution you, ladies and gentle-
11 men. I have read those overt acts. They were found
12 by the grand jury, but during this trial, we had
13 testimony and you must relate that testimony to these
14 allegations because they are only allegations, they
15 are not evidence in and of themselves, and you have
16 to keep that in mind.

17 The other thing is, I named a lot of
18 names here in the conspiracy count. You should not
19 speculate about that and find yourself -- confine
20 yourself to the evidence we have and the names that
21 came before us. The other names are meaningless as
22 far as we know, but at least you should not speculate
23 as to what other persons were in it or what might have
24 occurred that was not brought before us. You have to
25 keep that point in your minds because all you can base

1 the conspiracy charge on, it has to be proven beyond
2 a reasonable doubt, is that two or more conspired
3 to violate this section of the law, so that is the
4 indictment re-read to you. The overt acts, as I
5 tell you, are mere statements. You have to relate
6 them to the proof. If a defendant is named in there,
7 you do not think there is any evidence concerning him
8 in that regard, you should disregard that overt act.
9 Be sure to treat them separately, as I told you,
10 individually.

11 MR. RYAN: I believe the jury wanted
12 some exhibits.

13 THE COURT: That is right. Have we
14 marked -- is that the one? You had better look at it.

15 MR. RYAN: There were two exhibits re-
16 lating to the amended application, Judge.

17
18 THE COURT: Well, Mr. Dreyer, are you
19 satisfied they should have both of them?

20 MR. DREYER: Yes, sir.

21 THE COURT: Are all you other gentlemen
22 satisfied?

23 MR. LOMBARDINO: Yes, I am satisfied.

24 MR. LEONE: I am satisfied.

25 MR. LEBETKIN: I am satisfied.

1 THE COURT: All right, so you may
2 retire, ladies and gentlemen.

3 (Jury resumes deliberations).
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1 (Whereupon, at 3:35 p.m., the following
2 proceedings took place before the Court.)

3 THE COURT: Make sure that everyone
4 is here, Frank.

5 THE CLERK: Yes, Your Honor.

6 THE COURT: Bring in the jury.

7 (Whereupon, the following proceedings
8 took place before the Court and the jury.)

9 THE COURT: All right, I am going to
10 speak to your Foreman.

11 Your note says, 'Wilbur Katz,' and I
12 think that you mean William Katz, and his testimony
13 regarding Bruce Kay pertaining to the camper.

14 The reason I brought you back in, I
15 wanted to find out if you have any particular part
16 of that testimony relating to the camper that your
17 people, the other jurors and yourself, recall?
18 It would be helpful, because I don't know where it
19 is in all of Katz' testimony, and it will be quite
20 substantial. What camper are you talking about, and
21 what incident, and can you give us a location?

22 FOREMAN CHOW: That was the time, the
23 alleged time that the camper was driven by the Defendant
24 Bruce Kay, to unload -- or the camper was spotted at
25 the site of William Katz' house. Because -- it was

1 at Crescent. I guess that that was one incident at
2 Crescent.

3 The other time then, it was spotted
4 at Arlington, Vermont, I believe.

5 THE COURT: Those are the two incidents
6 involving the camper that you want the testimony read
7 about?

8 FOREMAN CHOW: Right.

9 THE COURT: Well, that gives us an idea,
10 and I am sure that the attorneys may be able to assist
11 our Court Reporter on locating the particular parts.

12 Don't you think you can do that, Mr. Ryan?

13 MR. RYAN: Yes.

14 I have talked to our Court Reporters about
15 those two references in Mr. Katz' testimony.

16 THE COURT: So we will have the Court
17 Reporters try and pick up those parts of the transcript,
18 and you may retire until he does so.

19 (Whereupon, the jury was excused at
20 3:38 p.m.)

21
22 (Whereupon, at 4:15 p.m., the following
23 proceedings took place before the Court.)

24 THE COURT: Mr. Ryan?

25 MR. RYAN: Judge, we have gone over

1 the notes of Katz' testimony, and we have agreed as
2 to what portions will be read. It is very short,
3 and it is in the direct examination of Mr. Katz.

4 My cross examination was directed at
5 a related conversation to the white camper between Katz
6 and my client, concerning cutting Levy out, and taking
7 over Cooney. And that is not part of the request.
8 We have picked out the portion we think answers the
9 jury's question, and it only deals with the Catskill
10 Street incident.

11 THE COURT: That will be helpful.

12 Are you agreed, Mr. Dreyer?

13 MR. DREYER: Yes.

14 THE COURT: Mr. Lombardino, are you
15 agreed?

16 MR. LOMBARDINO: Yes. It doesn't affect
17 my client, but I have agreed with Mr. Ryan and Mr.
18 Dreyer as to what is going to be read back.

19 THE COURT: Mr. Lebetkin?

20 MR. LEBETKIN: Since it is limited to
21 the camper, I agree.

22 MR. LEONE: I have no objection, Your
23 Honor.

24 THE COURT: I appreciate this very much,
25 because as you know, this helps our Court Reporters

1 find particular parts that the jury may be interested
2 in, and bring in the jury.

3 (Whereupon, the jury was returned to
4 the Courtroom.)

5 THE COURT: All right, Ladies and Gentlemen,
6 the attorneys have gone over the parts of the transcript
7 with the Court Reporters that they think that you want
8 read from the question that you had. It is a very
9 commendable attitude, so I believe now our Court Reporter
10 will read these particular portions to you.

11 (Whereupon, a portion of Mr. Katz'
12 direct examination, relating to the white camper,
13 agreed upon by all Counsel, was read to the jury by
14 the Court Reporter.)

15 THE COURT: Now, Mr. Chow, are you
16 satisfied that we have covered or read to you the
17 parts that you wanted?

18 FOREMAN CHOW: Yes, sir.

19 THE COURT: Do you have anything else
20 in mind?

21 I am going to ask you, Mr. Chow, is
22 there anything further that you think that you might
23 need to assist you, in the way of Exhibits, or other
24 testimony, because if you do, it would be a good time
25 now to tell us? Do you have anything in mind as yet?

1 FOREMAN CHOW: No.

2 JUROR NO. 9 (JANKOVIC): Did you get
3 our last note? The testimony about fixing the plumbing?

4 THE COURT: Would you stand up please?

5 JUROR NO. 9 (JANKOVIC): This is the
6 testimony where they said that they were fixing the
7 plumbing on Mr. Levy's house, and they brought the load
8 to Mr. Katz' house.

9 THE COURT: I don't know. The lawyers
10 would know more about that.

11 MR. DREYER: May we have a side-bar?

12 THE COURT: Yes.

13 (Whereupon, the following took place
14 at the side-bar, out of the hearing of the jury)

15 MR. DREYER: Now, Your Honor, I requested
16 this side-bar because when the Court Reporter read
17 back the questions, he left out a conversation between
18 Mr. Katz and Mr. Levy in which Mr. Levy explained to
19 Mr. Katz that he wanted to bring the load of Marijuana
20 over because there were repairs being done at his house.
21 We agreed at that time that the jury, apparently did
22 not want to hear that. But now it is the Government's
23 intention that they wanted to hear that, and I request
24 that it be read back.

25 I think that is what they want.

1 MR. LOMBARDINO: I think that was clear.

2 MR. DREYER: I think that he made it
3 clear in his oral request, and I think that Mr. Sheffer
4 should read the whole part, without omitting that
5 conversation.

6 THE COURT: I think it should be done.
7 Otherwise, they will think that we are holding something

8 MR. LOMBARDINO: I have no objection,
9 but I think that so the record is complete, if that is
10 what they want, they should give us a note in that
11 respect.

12 They sent out a second note that was
13 very explicit, and I think we know what is required.
14 If there was something else, I have no objection to it,
15 but I think it should be in note form.

16 MR. DREYER: I think that we have clarified
17 the position orally.

18 MR. LOMBARDINO: I think so, too.

19 When the Foreman said that that is what
20 they wanted.

21 MR. DREYER: The Court Reporter has it
22 marked, but we did not plan to have it read before.

23 THE COURT: I am going to allow it to
24 be read.

25 MR. LOMBARDINO: Well, note my objection.

1 (Whereupon, the following proceedings
2 took place before the Court and the jury.)

3 THE COURT: Well, we believe that we
4 have the portion that Mr. Jankovic was talking about,
5 and it is going to be read to you now by the Court
6 Reporter.

7 FOREMAN CHOW: There is another request
8 concerning the Defendant Mr. Lefebvre.

9 I believe that that was March 31st,
10 1974, and it was testified to by Mr. Cammusa. He
11 allegedly met Mr. Lefebvre. He got either one or
12 two pounds of this particular substance, from Mr. Le-
13 febvre. I guess that the rest of the jury would like
14 that.

15 THE COURT: That was by Mr. Cammusa?

16 FOREMAN CHOW: Yes, sir.

17 He made the comment on that date.

18 THE COURT: You have proven again that
19 your recollection of testimony is remarkable. I have
20 found this remarkable in many cases.

21 It is better if you put this in note form
22 and I think that maybe it might be better, for that part
23 and any other parts of the testimony, to put it in a
24 note, because that is the best way to do these things,
25 but in this instance, there has been a canvass of this

1 other testimony, and we will read this, and then put
2 the other part in note form and then you can send it
3 out.

4 (Whereupon, portions of testimony
5 concerning the problem involving plumbing were read
6 by the Reporter.)

7 THE COURT: Is that the portion?

8 FOREMAN CHOW: Yes.

9 THE COURT: Well, I think that we have
10 some idea about this other. We will start searching
11 for the Cammusa testimony regarding what Mr. Chow talked
12 about.

13 I realize, Ladies and Gentlemen, as you
14 go along, you may be talking about testimony and you
15 cannot tell all at once all of the parts that you want
16 read, but as much as you can, if you write it out on
17 notes, then we can check for it, and so forth.

18 (Whereupon, the jury was excused.)

19 THE CLERK: Court stands in recess

20 (Whereupon, at 8:30 p.m., the following
21 proceedings took place before the Court and the jury)

22 THE COURT: Bring in the jury.

23 Mr. Foreman, and Ladies and Gentlemen,
24 we have your notes, and the attorneys and the Court
25 Reporters have gone over the testimony that they think

1 that you want read, and we are going to start with
2 Mr. Cammusa's testimony, and it goes up to the testimony
3 including Cammusa's giving Lefebvre the check.

4 Then the next will be by the other
5 Court Reporter, and I believe that it is Roth's testimony
6 and the meeting involved in Cooney's moving to Arizona
7 and then we will finish with the Moscovitz testimony
8 concerning unloading from under the bed of the camper,
9 and that is the testimony that you wanted read.

10 We will start with Cammusa's testimony.

11 (Testimony of Mr. Cammusa, requested by
12 the jury, was read by the Court Reporters)

13 THE COURT: Now, Ladies and Gentlemen,
14 is that the part that you wanted read back to you?

15 Now, we will hear Mr. Roth's testimony.

16 (Mr. Roth's testimony, as requested by
17 the jury, was read by the Court Reporter.)

18 THE COURT: You are excused.

19 (Whereupon, the jury returned to the
20 jury room.)

21 THE CLERK: Court stands in recess.

22 (Whereupon, at 2:45 p.m., the following
23 proceedings took place in the Courtroom before the
24 Court, out of the presence of the jury.)

25 MR. DREYER: Your Honor, what we propose

1 to do now is have the Court Reporter read back the
2 direct testimony of Mr. Roth concerning the meeting
3 between Kevin Cooney, and at Mr. Cooney's house in
4 June or July of 1972.

5 Then we propose to have the Court Reporter
6 read back certain parts of the cross examination about
7 that meeting.

8 Then we propose to have the Court
9 Reporter read back the Moscovitz testimony which is
10 also requested.

11 However, Mr. Lombardino has explained
12 to me that there are certain points of cross examination
13 concerning the Roth meeting that we cannot find at this
14 point, that he would like to explore. So what we are
15 proposing is that the Court Reporter read back what
16 we just stated, and in the morning, we will have the
17 other part of the cross examination, and it can be
18 read to the jury at that time, and after these
19 conversations are recited to the jury, that we may
20 be able to go home tonight, and meet in the morning,
21 because of the hour.

22 THE COURT: Well, are we ready to read?

23 MR. LOMBARDINO: Mr. Dreyer states
24 that quite accurately. If Your Honor inspects that note,
25 apparently the jury is asking about Mr. Cooney moving

1 to Arizona. Now, an inspection of the direct examination
2 of Mr. Roth, within four or five questions, that question
3 that the jury is asking, could be satisfied. What I
4 am asking is that the jury might want more than appears
5 in that note, and that that being the posture of their
6 thinking, then I think that it would require us reading
7 more of the direct testimony, as we have been trying
8 to seek out of the record.

9 There is a great confusion in my
10 mind, Your Honor, as to how far the jury wants to go
11 in asking that question. Could we have a clarification
12 from Mr. Chow as to exactly what they are seeking?
13 It could end itself in five questions, or it could go
14 on for some length, including some cross examination.

15 MR. DREYER: Let me state this, Your
16 Honor: I think that the problem is that the conversation
17 will take about five minutes to read.

18 THE COURT: That sounds correct.

19 MR. DREYER: But what Mr. Lombardino is
20 referring to is this: when the Court Reporter reads
21 the testimony, Mr. Roth will say that Kevin Cooney told
22 him that he was going to law school in Arizona, and
23 at that point the conversation would extend on and it
24 was not strictly concluded at that point.

25 We are contending that they do not want

1 to hear about Mr. Cooney and the law school, but the
2 conversation that Mr. Cooney had concerning the Marijuana,
3 and Mr. Levy.

4 MR. LOMBARDINO: If that is the case,
5 then I feel that we have a corresponding right to examine
6 the record on cross examination to see what was elicited
7 to contradict that testimony. But the note is somewhat
8 ambiguous, and I am not trying to defeat the Court, but
9 the note is not that clear.

10 THE COURT: I will inquire, and straighten
11 that part out.

12 What about the other one?

13 MR. DREYER: There is no problem on
14 Moscovitz. That is ready to go.

15 But the direct testimony on the
16 conversation with Roth and Cooney will take five
17 minutes to read in its entirety.

18 THE COURT: Why not Moscovitz first,
19 and then go ahead?

20 MR. LOMBARDINO: That is a good idea.

21 THE COURT: We will take Moscovitz first.

22 (Whereupon, the jury was returned to
23 the Courtroom and the following proceedings took place
24 before the Court and the jury.)

25 THE COURT: Ladies and Gentlemen, first

1 we are going to read to you the testimony that the
2 attorneys and the Court have gone over that involves
3 Moscowitz' testimony, and on Kay concerning the
4 unloading from under the bed in the camper. That
5 is the wording of the note that was given to us.

6 We are going to start with that testimony.

7 (Whereupon, the testimony was read by
8 the Court Reporter.)

9 THE COURT: Now, Mr. Chow, I am going
10 to ask you some questions about the Roth testimony
11 of the meeting involving the Cooney's moving to Arizona.
12 The attorneys think that we need some clarification
13 and is that your own handwritten note?

14 FOREMAN CHOW: No, that was our thinking,
15 but it was written by Judith Earl here, and we were
16 trying, at one point, and I guess that the jury would
17 like to hear, Your Honor, after the Cooneys left to
18 Arizona, there was -- before he left there, there was
19 some meeting between Mr. Roth and Mr. Levy and Mr. Cooney
20 about the future activities. That is the part that
21 the jury would like to hear.

22 THE COURT: Do you have any idea how
23 much that involves?

24 FOREMAN CHOW: Very short, sir. Very,
25 very short.

1 THE COURT: Will you know whether it
2 was developed on direct examination or not?

3 FOREMAN CHOW: I think it was.

4 THE COURT: That is the examination
5 by Mr. Dreyer?

6 FOREMAN CHOW: Yes, by Mr. Dreyer.

7 THE COURT: And the question we have
8 is whether there is some pursuit along that same subject
9 on cross examination about things that took place out
10 in Arizona, that Roth talked about or is it only that
11 first part that we are looking for?

12 FOREMAN CHOW: The first part we were
13 looking for.

14 THE COURT: We will first read that,
15 and then you will listen, and see if there is anything
16 further that you think you want.

17 (Whereupon, the Court Reporter read
18 testimony of Mr. Roth.)

19 THE COURT: Now, is that what you wanted
20 Ladies and Gentlemen, and are you satisfied now?

21 FOREMAN CHOW: I guess that the Jurors
22 would like to hear the redirect by Mr. Lombardino on
23 that.

24 THE COURT: Do you mean the cross
25 examination?

1 FOREMAN CHOW: Yes. That was Mr.
2 Lombardino.

3 MR. LOMBARDINO: That is why I asked
4 for the clarification, because we have been trying
5 to find the cross examination, and it extends over
6 the record, and it will take some time, Your Honor.

7 I would be more than happy to do it if
8 the jury is physically up to waiting for us to go
9 through the record.

10 MR. DREYER: There are two parts of
11 the cross examination that he can read now, and
12 perhaps we can reconvene in the morning, and continue.

13 THE COURT: Is there something to read
14 now?

15 MR. LOMBARDINO: Well, there is one
16 short part that we have found, Your Honor, concerning
17 two or three questions I propounded to him, concerning
18 moving to Arizona, but that might very well have
19 taken place now at a conversation that allegedly took
20 place in the State of Arizona. But we have found
21 something. It is so small that it might be that
22 the jury wants more, but we can certainly have that
23 read.

24 FOREMAN CHOW: Could we have that read?

25 THE COURT: As I understand you, you

1 are directing your attention to the meeting in Albany,
2 before moving to Arizona?

3 FOREMAN CHOW: Yes.

4 MR. DREYER: There is some cross
5 examination that we have on that.

6 THE COURT: I think that we should read
7 the cross examination that we have.

8 MR. LOMBARDINO: I did examine Mr. Roth
9 on this proposition, Your Honor. I did examine Mr.
10 Roth on this very subject that we are discussing.

11 THE COURT: And you have that part and
12 it is there?

13 MR. LOMBARDINO: We have found a portion
14 of that, and we can see if it satisfies what you have
15 in your mind.

16 (Cross examination of Mr. Roth by
17 Mr. Lombardino was read by the Reporter.)

18 MR. DREYER: Now, skip ahead to the
19 next part.

20 MR. LOMBARDINO: May we note now that
21 he is going to read about the asthma and the law
22 school, and that took place in the state of Arizona.

23 THE COURT: That is what I wanted
24 to ask the jury, and is that the conversation that
25 you also want? You first started with the one in

1 Albany and the meeting with Levy and the Cooneys. Do
2 you want anything about the further meeting and contacts
3 in Arizona?

4 FOREMAN CHOW: No, sir. I guess that
5 that is it.

6 THE COURT: Are you satisfied with what
7 has been read just now?

8 Mr. Chow, do you think that they are
9 satisfied?

10 FOREMAN CHOW: I think that we are
11 satisfied, yes.

12 THE COURT: Do you think that you want
13 to resume deliberations now?

14 FOREMAN CHOW: I think that if we could,
15 we would like to.

16 THE COURT: Thank you very much.

17 (Whereupon, the jury was excused.)

18 THE CLERK: Court stands in recess.

19 (Whereupon, at 10:40 p.m., the following
20 took place before the Court, out of the presence of
21 the jury)

22 MR. LEONE: I have an application, before
23 the jury comes in.

24 THE COURT: All right.

25 MR. LEONE: On behalf of the Defendant,

1 Lefebvre, it seems that this jury keeps asking for
2 testimony about Cammusa. Now, because for the sake
3 of repetition in my cross examination of Mr. Cammusa,
4 I did not bring up certain facts and there were certain
5 facts brought out by my colleagues regarding my client
6 during their cross examination.

7 And I think that it would only be fair
8 that all of the cross examination be read of Mr. Cammusa.

9 MR. LOMBARDINO: I have an application in
10 regard to the last thing that occurred in this Courtroom
11 concerning my client, Mr. Cooney. It is quite obvious
12 and apparent, Judge, that the jury was seeking to find
13 out by way of not only direct, but also cross examination,
14 certain things that led or that were allegedly said
15 by Mr. Roth concerning his meeting and conversations
16 with Kevin Cooney.

17 Now, we do not have Daily Copy, Your
18 Honor, and what has happened, it has become almost
19 impossible to pinpoint the contradicting points that
20 came out on cross examination.

21 I am asking Your Honor, in the interest
22 of Justice, and the only fair thing to do, so that the
23 Defendants can be assured that all of the Defense
24 testimony comes out for them to consider, is that the
25 cross examination, as Mr. Leone points out, that the

1 cross examination on Roth be read back to them. I just
2 cannot find in the record, those portions dealing
3 with the conversation with Mr. Cooney.

4 Now, we were able to find that direct,
5 because it started off immediately. There is testimony
6 in that regard that was educed on cross examination,
7 and through no fault of anyone, Your Honor, it is just
8 not being heard by the jury.

9 THE COURT: I am going to follow my
10 usual routine, that I followed for many years. I
11 instructed them to give us notes on what particular
12 parts they wanted read. In my judgement, from talking
13 to them, we have a highly perceptive and intelligent
14 jury, and they are selecting the parts that they want,
15 and I have been asking if they want any other parts,
16 and if they do, I am going to take what they tell me
17 as something that they gave thought to and I am going
18 to follow that system, because otherwise, of course,
19 we do not have Daily Copy, but that is nobody's fault
20 at all, because Daily Copy was not provided in this
21 case, and very seldom is.

22 I am going to follow the same system
23 that we have, and try and satisfy myself that the jury
24 is obtaining everything that they seek.

25 And for that reason, I deny Mr. Cooney's

1 application, because we will be reading the whole
2 record, really, and we will have a new trial and
3 reading here for six days.

4 MR. LOMBARDINO: May I point out that
5 Mr. Chow, the Foreman, had a conversation with
6 someone in the second row, and indicated that they
7 wanted to hear -- he said something about redirect
8 when in fact, he meant cross examination.

9 THE COURT: That was a very slight
10 inadvertence, because it was corrected immediately.

11 MR. LOMBARDINO: I agree that it was
12 between redirect and cross, but obviously they want
13 to hear the cross examination.

14 THE COURT: I am very much satisfied
15 with the colloquy with this jury.. I just have a
16 feeling that they know what they are looking for.
17 They impressed me, and Ms. Earl talked, and I think
18 Number Seven Juror talked, but they seemed to be
19 settled on what they want, and I am not going to
20 interfere now with their judgement by saying we
21 are going to read things that they are not asking
22 for. I don't think that that is good.

23 MR. LOMBARDINO: I submit that they
24 asked for cross examination.

25 THE COURT: I made my ruling.

1 MR. LEBETKIN: It was Mr. Chow that made
2 that remark that they wanted cross examination, or
3 as he termed it, redirect by Mr. Lombardino, and that
4 was a particular point. And that was because Juror
5 Number Ten or Eleven reached over and told him to ask
6 for it.

7 Now, after the examination or the testimony
8 was reread, it was Mr. Chow who said that he was
9 satisfied, but Ten and Eleven, who asked him to do that,
10 were not satisfied, because they never heard what they
11 wanted, and that, I think there is a misunderstanding
12 in your colloquy between yourself, Judge, and Mr. Chow,
13 you see.

14 And if Your Honor would be kind enough
15 to inquire whether Ten and Eleven, the ones who requested
16 Mr. Chow, because he is the Foreman, to ask Your Honor
17 that, whether or not they were satisfied with what
18 they requested, I would appreciate it.

19 THE COURT: I will ask them that.

20 MR. LEBETKIN: Thank you.

21 THE COURT: All right, bring them in.

22 (Whereupon, at 10:50 p.m., the jury was
23 returned to the Courtroom and the following proceedings
24 took place before the Court and the jury)

25 THE COURT: All right, first I am going

1 to ask, Mr. Chow, and we had some question about the
2 jurors as to whether you were satisfied, and do you
3 remember when we reread the Roth testimony involving
4 the Cooneys moving to Arizona, and I think that that
5 is the part that Mr. Lebetkin, you have questioned me
6 about?

7 MR. LEBETKIN: Well, my inquiry, Judge,
8 was whether or not other members of the jury were --

9 THE COURT: No, that was the subject,
10 was it?

11 MR. LEBETKIN: That was the subject,
12 yes.

13 THE COURT: I will ask it. When we
14 finished with that, and reading that part, and first
15 Mr. Chow called it cross examination or redirect,
16 but that was, as you finally quickly said, you meant
17 cross examination by Mr. Lombardino, and then it was
18 read, and then, as far as I understood you, just from
19 observing, you seemed to be all satisfied.

20 Juror Number Ten and Eleven, and maybe
21 it might have been Ten and Eleven, at least the lawyers
22 thought that you were expressing in some way that you
23 may not have been satisfied, as Mr. Chow was telling
24 me. Were you satisfied?

25 JUROR NO. 10 (EARL): Yes.

1 THE COURT: How about Juror Number
2 Eleven?

3 JUROR NO. 11 (GREEN): Yes.

4 THE COURT: Now, on your other note
5 here: 'May we please hear Mr. Ryan's cross examination
6 of Cammusa, about Bruce Kay' and Mr. Chow, this comes
7 from your group, and it is directed at that particular
8 cross examination by Mr. Ryan of Mr. Cammusa, concerning
9 Bruce Kay?

10 FOREMAN CHOW: Yes, sir.

11 THE COURT: And they think they have
12 pinpointed it, the lawyers, and the Court Reporter,
13 and it is going to take some reading, and it will be
14 a half an hour or so, and we will start with it.

15 (Whereupon, the cross examination by
16 Mr. Ryan of Mr. Cammusa was read by the Court Reporter)

17 THE COURT: Now, Mr. Chow, is that
18 what the jury wanted?

19 FOREMAN CHOW: Yes, sir.

20 THE COURT: And are you satisfied now
21 that we have read all that you wanted at this time?

22 FOREMAN CHOW: Yes.

23 THE COURT: Now, I am going to ask you
24 to be careful how you answer me. Do you want to
25 continue your deliberations, or do you want to start

again in the morning?

It is getting late, and it is quarter after eleven.

I know some of you come from as far as Lake George and Glens Falls, and these are quite some distances from here.

Have you made any canvass about what the Jurors want to do in that respect? I don't want to find out whether you have progressed in your deliberations either way, or what has happened.

FOREMAN CHOW: If we could, I think that we would like a little time for deliberations, and consume a little more deliberations, if we could.

THE COURT: I didn't understand you.

FOREMAN CHOW: If we can, we would like to resume our deliberations.

THE COURT: Thank you.

It is now 11:15, and the jury will retire
(Whereupon, the jury retired to the Juryroom.)

(Whereupon, at 11:35 p.m., the jury was returned to the Court room and the following proceedings took place.)

THE COURT: Mr. Clerk, take the verdict

1 from the jury.

2 THE CLERK: Ladies and Gentlemen of
3 the Jury, have you agreed upon a verdict, and if so,
4 now do you find, and who shall say for you?

5 FOREMAN CHOW: Yes, sir.

6 Yes, Your Honor, sir: all of us here,
7 we all find the Defendants Mr. Cooney, guilty; Mr.
8 Lefebvre, guilty; Mr. Levy, guilty; Mr. Kay, guilty.

9 THE CLERK: Harken to your verdict,
10 Ladies and Gentlemen, as the Court has recorded it.
11 You say that you find each Defendant guilty, and so
12 say you all?

13 THE COURT: I will ask you, do you have
14 anything to say?

15 FOREMAN CHOW: No, sir.

16 THE COURT: I want to ask Counsel now?

17 MR. LOMBARDINO: Your Honor, I would
18 like to have the jury polled.

19 THE COURT: Each one of them?

20 MR. LEBETKIN: I join in that.

21 MR. LEONE: Yes, I do.

22 MR. RYAN: Mr. Bruce Kay joins in that.

23 THE COURT: We will poll them on each
24 of the four Defendants. Take them in that order.

25 Cooney, Levy, Lefebvre, and Kay.

* * *

1 Meyers.

2 JUROR NO. 6 (MEYERS): Guilty.

3 THE CLERK: Juror Number 7, Arnold

4 Glover.

5 JUROR NO. 7 (GLOVER): Guilty.

6 THE CLERK: Juror Number 8, Lawrence

7 Mudrey.

8 JUROR NO. 8 (MUDREY): Guilty.

9 THE CLERK: Juror Number 9, Joseph

10 Jankovic.

11 JUROR NO. 9 (JANKOVIC): Guilty.

12 THE CLERK: Juror Number 10, Judith

13 Earl.

14 JUROR NO. 10 (EARL): I would like to
15 say not sure, but I say guilty because of the other --
16 realizing that all --

17 THE COURT: (Interrupting) Speak right
18 out.

19 JUROR NO. 10 (EARL): I would like to
20 say, not sure, but realizing that I am not going to
21 persuade eleven jurors to change their vote.

22 THE COURT: What is your verdict, your
23 judgement?

24 JUROR NO. 10 (EARL): Guilty.

25 THE COURT: All right.

1

THE CLERK: Number 11, Michael Green.

2

JUROR NO. 11 (GREEN): Guilty.

3

THE CLERK: Juror Number 12, Elizabetha

4

Catalano.

5

JUROR NO. 12 (CATALANO): Guilty.

6

THE COURT: Miss Earl, I am going to

7

ask you, particularly on this last call that we had:

8

did you surrender any convictions because of any

9

pressures on you, or is that your judgement that you

10

find that this Defendant Kay is guilty? You have to

11

use your own judgement.

12

JUROR NO. 10 (EARL): I definitely feel

13

pressures.

14

THE COURT: What did you say?

15

JUROR NO. 10 (EARL): I definitely

16

feel pressures.

17

THE COURT: I can't hear you.

18

JUROR NO. 10 (EARL): I definitely feel

19

pressure on this decision.

20

THE COURT: What kind of pressure?

21

Did you listen to the opinions of the other jurors?

22

JUROR NO. 10 (EARL): Yes. I have

23

requested that we ask Your Honor to review the legal

24

advice, or the legal charge that you gave us about the

25

conspiracy, relating to the part where they said that

1 they would have to be involved in only a small portion
2 of the conspiracy, or not to be convicted --

3 THE COURT: Well, isn't that --

4 JUROR NO. 10 (EARL): I don't know.

5 THE COURT: Wasn't that made clear to
6 you?

7 JUROR NO. 10 (EARL): The other point
8 that I had some doubt on, and I am only saying this
9 because of my reasonable doubt, and I feel that it is
10 reasonable, was the points that were made about Bruce
11 Kay taking over the conspiracy, and I felt that I have
12 reasonable doubt about that.

13 THE COURT: Well, I have to inquire,
14 because we are in an awkward position: you were polled
15 here and the question is, do you find Kay guilty under
16 the law as I charged you, and on the testimony given
17 in this case.

18 How old are you?

19 JUROR NO. 10 (EARL): Twenty-five.

20 THE COURT: And was any coercion placed
21 upon you to return a verdict here?

22 JUROR NO. 10 (EARL): No. I don't --
23 I mean the only one I felt unsure of, having any doubt
24 on, was that last Defendant, was Bruce Kay, and I have --

25 THE COURT: You may have felt, but did

1 you finally reach a conclusion that you want reported
2 and made part of the verdict in this case?

3 JUROR NO. 10 (EARL): Yes, I said that
4 I do.

5 THE COURT: And you do that freely,
6 and that is the point that we are trying to find out.
7 Are you under any pressure? It is your judgement, your
8 own mind has to make the decision.

9 JUROR NO. 10 (EARL): I concede that
10 Bruce Kay is guilty.

11 THE COURT: Do you say he is guilty?

12 JUROR NO. 10 (EARL): Yes.

13 THE COURT: Now, I am going to take
14 her verdict and her judgement.

15 That happens in many instances when
16 reasonable doubt arises in the minds of the jurors,
17 that your judgement has to be made.

18 MR. RYAN: Your Honor, under the
19 circumstances, that she has explained --

20 THE COURT: Do you find he is guilty?
21 I am going to ask you directly.

22 JUROR NO. 10 (EARL): Yes, I find that
23 he is guilty.

24 THE COURT: That is your finding as a
25 juror, to apply the law and listen to the facts and

1 the testimony and reach a judgement, and is that your
2 judgement?

3 JUROR NO. 10 (EARL): Yes, sir.

4 THE COURT: Is it?

5 JUROR NO. 10 (EARL): Yes, sir.

6 THE COURT: Now is the time to express
7 it. You have two things, guilty or not guilty.

8 JUROR NO. 10 (EARL): Guilty.

9 THE COURT: All right.

10 MR. RYAN: May I inquire?

11 THE COURT: No, I am going to accept
12 the verdict.

13 MR. LOMBARDINO: I have an application.

14 THE COURT: What is your application?

15 MR. LOMBARDINO: In the early part of
16 this trial, it was quite obvious that the Foreman,
17 Mr. Chow, was taking notes. As a matter of fact,
18 Your Honor inquired. I recall before where Mr. Chow
19 stood up concerning some of the examination; he was very
20 specific about Roth's testimony concerning, it is a
21 meeting that was quite well fixed in Mr. Chow's mind.

22 I respectfully request the Court, at
23 this time, to have Mr. Chow's notes produced and marked
24 either as a Court Exhibit or marked as a Defendants'
25 Exhibit.

1 THE COURT: Well, I will ask Mr. Chow:
2 do you have those notes, sir?

3 JUROR NO. 1 (CHOW): That was the one
4 time that I tried to, Your Honor, give it back to the
5 Marshal, and that was during your observation, Your
6 Honor, sir. I had those notes, and that was written
7 on some of a napkin.

8 THE COURT: Had you shown those notes
9 or discussed them with any other jurors?

10 JUROR NO. 1 (CHOW): I did jot down my
11 memory from time to time.

12 THE COURT: You mean, during the trial,
13 or what?

14 JUROR NO. 1 (CHOW): I was sitting in
15 the juryroom, I did that, and tried to have my own
16 memory refreshed.

17 THE COURT: No, I deny the application.

18 MR. LOMBARDINO: Can't we have them
19 marked. I just wantto have the notes marked.

20 THE COURT: I don't think that we need
21 it. I don't think that there is any prejudice or harm,
22 or no discussion at the time it was developed. It was
23 brought out in open court, and I told him that he had
24 the right to continue making them if he wanted to, and
25 nobody said a word about it.

1 MR. LOMBARDINO: I was not in the
2 juryroom, and I respectfully submit, Your Honor, was
3 not either. That may have been a contributing part,
4 if Mr. Chow referred to his notes, and then spoke.

5 THE COURT: No, I have no doubt about
6 it. Where are the notes, and do you have them,
7 Mr. Marshal?

8 MARSHAL BRINKMAN: No, I never touched
9 them. You said that they were all right for him
10 to keep and he offered them to me, and I said that they
11 are yours, and what do you want with them.

12 THE COURT: Do you have them in your
13 possession now?

14 JUROR NO. 1 (CHOW): Not those notes, sir.

15 THE COURT: What did you do with those
16 notes?

17 JUROR NO. 1 (CHOW): I probably threw
18 them away.

19 THE COURT: The ones that you were taking
20 in the jurybox?

21 JUROR NO. 1 (CHOW): Some of them I had
22 with me here.

23 THE COURT: Do you have those notes?

24 JUROR NO. 1 (CHOW): Yes, I have
25 those notes. No, I didn't take them from here.

1 THE COURT: The ones in the jurybox that
2 you were taking?

3 JUROR NO. 1 (CHOW): No, those, that was
4 from, no, I probably destroyed them.

5 THE COURT: You destroyed them?

6 JUROR NO. 1 (CHOW): Right.

7 JUROR NO. 10 (EARL): I have no objections
8 to it, but there are notes in there, written by him, and
9 I have no objection to it.

10 THE COURT: We have a policy. This is
11 not very unusual, and I am not upset about it at all
12 because this is our jury function, and I am satisfied
13 that you gave the case conscientious deliberation, and
14 you were extremely perceptive in the questions that you
15 posed in your written notes, and your attention was
16 shown by the perception that you had about different
17 parts of the testimony.

18 I am satisfied that you followed the
19 testimony and applied the law, and you gave the case
20 careful and lengthy consideration. I think we still have
21 to poll Number 11 and 12 on the last one, Kay. We are
22 polling the verdict that was first returned by Mr.
23 Chow for the entire group. We will take 11 and 12.

24 THE CLERK: Juror Number 11, Michael
25 Green.

1

JUROR NO. 11 (GREEN): Guilty.

2

3

Catalano.

4

5

JUROR NO. 12 (CATALANO): Guilty.

6

THE COURT: All right.

7

8

MR. LOMBARDINO: Is the record clear,
Your Honor, that there was mention made that there were
notes in the juryroom?

9

10

11

12

13

14

15

THE COURT: I think that there are a lot
of things that are not too serious. As far as I
understood, Mr. Chow, on your own, you made notes as
you went back in, and later had those to jog your
memory during the discussion, and that was the type of
notes that you mean?

16

17

JUROR NO. 1 (CHOW): That is right. But
the notes that I took --

18

19

THE COURT: Not that they were taken
here as the testimony was going on?

20

21

JUROR NO. 1 (CHOW): No, sir, that was
destroyed. That was written on tissue.

22

23

THE COURT: And used to refresh your own
memory?

24

25

JUROR NO. 1 (CHOW): Yes, sir.

THE COURT: And made during the times
that you were sitting in the juryroom? Is that right?

1 JUROR NO. 1 (CHOW): That was the time
2 that I heard all of the testimony and sometimes it was
3 during the evening, and sometimes it was when we were
4 just in the juryroom and I jotted down some of the points.

5 THE COURT: And then you kept those notes?

6 JUROR NO. 1 (CHOW): Yes, but only
7 partially, and not the complete text.

8 MR. LOMBARDINO: May we inquire if he now
9 has the notes in his possession, and if at any time
10 he referred to those notes in front of the jury?

11 THE COURT: Was it wrong if he did?

12 MR. LOMBARDINO: I respectfully submit
13 that there is a lot wrong about that. If Mr. Chow
14 used some notes in connection with the jury in his
15 deliberations in that juryroom, this is not proper,
16 Judge. It is not the function of any one juror to
17 take notes, and then attempt to use them to refresh
18 the recollection of other jurors.. If that had to be
19 done, the way to do it is on the record, through a
20 re-reading of the testimony, and not by the use of
21 one individual's notes. It might very well have been
22 that a point or two had been written down, and mis-
23 construed by the author of those notes, and that might
24 very well have transpired.

25 THE COURT: No, I am --

1 MR. LOMBARDINO: I am sure that he has
2 notes in his pocket now.

3 THE COURT: Please, I am satisfied
4 that everything was well --

5 MR. LOMBARDINO: I have a record to
6 protect, and I am sure that the Court appreciate that.

7 THE COURT: Are the notes in existence
8 in the juryroom?

9 JUROR NO. 1 (CHOW): Very partial, and
10 I jotted down two points --

11 THE COURT: Can you find these , and are
12 they in existence in the juryroom?

13 JUROR NO. 1 (CHOW): Yes, I could find
14 out whatever is there if that is what you want.

15 THE COURT: I mean, to satisfy this
16 attorney, go and get those pages, and can you find them?

17 JUROR NO. 1 (CHOW): Yes.

18 THE COURT: And file them with the Clerk.

19 MR. LEONE: I join with Mr. Lombardino.

20 MR. RYAN: I join in that.

21 MR. LEBETKIN: We all join in that,

22 Judge.

23 (Whereupon, Juror No. 1 (CHOW), left
24 the jurybox, went into the juryroom, and returned
25 to the jurybox)

1 THE COURT: All right, Mr. Chow, I have
2 four pages, and these are the notes that you made
3 personally, yourself?

4 JUROR NO. 1 (CHOW): Yes.

5 THE COURT: And you might as well state,
6 what is your occupation and profession?

7 JUROR NO. 1 (CHOW): Engineer, sir.

8 THE COURT: And where are you employed?

9 JUROR NO. 1 (CHOW): General Electric
10 Company, Schenectady, New York.

11 THE COURT: So I will file these for the
12 record as a Court Exhibit, and in the proper order.

13 MR. LOMBARDINO: Thank you, Your Honor.

14 THE COURT: And, Mr. Lombardino, you
15 can have xeroxed copies of them.

16 MR. LOMBARDINO: That is very fine,
17 Your Honor, and I appreciate it.

18 THE COURT: So, Ladies and Gentlemen,
19 as I told you, I am satisfied that you delivered a
20 conscientious, careful verdict, and one made after the
21 attention that the case deserved, and it was a
22 difficult case, and covered a long period of time.

23 There was a lot of testimony, and the
24 evidence, several days that you followed it, and that is
25 what we want.

* * *

1 we have a central office on Grooms Road in Clifton
2 Park, and that is the only place that I went to.

3 I am a switchman for the New York
4 Telephone Company.

5 THE COURT: I am satisfied with your
6 verdict; highly satisfied, and so I thank you very
7 much, and ask you to return on January 4th, and I wish
8 you all a happy holiday.

9 JUROR NO. 1 (CHOW): Happy holiday
10 to you, sir.

11 (Whereupon, the jury was excused.)

12 THE COURT: Now, what I do, I assume
13 Mr. Dreyer may move to sentence tonight?

14 MR. DREYER: I move or request that it
15 be deferred, and it is the practice of this Court to
16 move for sentencing, but it is a practice of the Court
17 also to move for sentencing after the pre-sentence
18 report.

19 THE COURT: Well, I have to take the
20 Motions with regard to the jury verdict.

21 MR. DREYER: Yes, sir.

22 THE COURT: I will take those at this
23 time.

24 MR. RYAN: Of course, on behalf of
25 the Defendant Bruce Kay, I move to set aside the verdict

1 as contrary to the credible evidence in the case,
2 and the second ground for my Motion is that Bruce Kay
3 did not receive a verdict based on twelve independent
4 votes, by people who were convinced of the evidence
5 beyond a reasonable doubt.

6 The colloquy and the statement made
7 here by Juror Number 10, unequivocally shows in my
8 judgement, that this 25-year-old woman had a reasonable
9 doubt as to Bruce Kay's guilt.

10 I know, Judge, that in your leading and
11 your examining of this jury, she felt that she did,
12 in the juryroom, she had to concede that her vote should
13 be guilty. She definitely stated, and we all heard it,
14 that she only bowed because she felt she couldn't per-
15 suade the others, and she stated, and I think that the
16 Court Reporter picked it up, that she was pressured into
17 a vote.

18 I will do some research on that matter,
19 and make an appropriate Motion, based on this juror's
20 examination.

21 In addition, Judge, I am going to make
22 an effort to interview the juror, and I want to put
23 that on the record, too, in support of my Motion.

24 So based on those matters, I wish to
25 move to set aside the verdict against Mr. Kay.

1 THE COURT: Mr. Dreyer, do you want to
2 reply to that, for the record?

3 MR. DREYER: No, I think that the
4 question about the juror was handled by the Court without
5 intervention by the Government.

6 THE COURT: I will deny the Motion. I
7 am well satisfied with the decision that she made, and,
8 of course, that is part of the jury process at this time
9 People change, and judgements are changed by opinions,
10 and exchange, and one from the other, and so forth. That
11 is part of our system.

12 MR. RYAN: But when she set in this chair
13 and she was polled and asked whether or not -- what her
14 vote was, she could not answer guilty when she was asked
15 that question, and she gave an explanation.

16 THE COURT: I am content to stay on her
17 verdict as she expressed it finally and flatly that she
18 found the Defendant guilty.

19 MR. RYAN: I think that, Judge, I should
20 have been afforded an opportunity to have made an
21 inquiry of the juror before Your Honor accepted her
22 verdict.

23 THE COURT: Well, you stated that for
24 the record. I don't think that you are so entitled.

25 Mr. Lombardino?

1 MR. LOMBARDINO: On behalf of Defendant
2 Cooney, I respectfully, at this time, move to set aside
3 the verdict on the ground that it is contrary to the
4 credible evidence, and the Government has failed to
5 prove guilt beyond a reasonable doubt.

6 In addition, thereto, Your Honor, I
7 respectfully move to set aside the verdict on the
8 grounds that the guilty verdict, apparently, now,
9 especially in light of the fact that Your Honor has
10 received four pages of notes from the Foreman, which
11 are not only notes that he has taken today, but apparently
12 this has been a running account of notes that he has
13 compiled on a day-to-day basis, whereby he has stated
14 to the Court that he wrote notes on napkins or tissues,
15 and he would throw them away, and transfer the notes
16 on these papers.

17 In addition thereto, it is quite clear
18 that Mr. Chow had these notes in the juryroom during the
19 course of the deliberations. As a matter of fact, Your
20 Honor, in asking, and in all fairness we did ask Mr.
21 Chow to produce those notes, and he had to leave the
22 Courtroom and go inside the juryroom and leave the
23 eleven sitting here, and he came back with four pages
24 of notes.

25 I submit to you, Your Honor, that this

1 is probably, and has far-reaching influence by Mr.
2 Chow, the Foreman of the jury, and on the other eleven
3 members, at any rate, and we will never know, because
4 we did not inquire as to what effect or what use those
5 notes were ultimately put to during the course of the
6 deliberations.

7 As a matter of fact, Number 10, the same
8 young lady who appeared so very upset when she returned
9 her verdict, as she said, she was not sure, indicated
10 that Mr. Chow had these notes, and was looking at them,
11 and speaking in relation to the notes during the course
12 of the deliberations, and therefore, I respectfully
13 submit that the verdict be set aside.

14 THE COURT: Motion denied.

15 MR. RYAN: May I be excused for a minute,
16 Judge; one minute?

17 THE COURT: I think that you should wait
18 until the other lawyers finish their Motions.

19 You want to go and see Miss Earl, don't
20 you?

21 MR. RYAN: I just want to -- I do.

22 THE COURT: You can go and see her.
23 She will be around.

24 MR. RYAN: She will be out of the
25 Courthouse.

1 THE COURT: She lives in Lake George,
2 and you can find her.

3 MR. LEBETKIN: Your Honor, I respectfully
4 move to set aside the verdict as being contrary to the
5 weight of the evidence, the credible evidence, and I
6 also would like to point out that Number 10, something
7 prompted Number 10 to indicate to Your Honor that perhaps
8 Mr. Chow was being less than candid with the Court with
9 respect to those papers, and the impression that I got
10 from Mr. Chow, when he was engaged in that colloquy with
11 Your Honor, was that he may have had a scratch paper
12 there, or a napkin in the juryroom, and something
13 insignificant.

14 That turns out to be four pages, and it
15 may very well be, Judge, that this woman was upset by
16 actions in the juryroom, including -- including what
17 Mr. Chow was doing.

18 Now, I am not really satisfied that there
19 was no undue influence on this woman. Not only with
20 respect to Bruce Kay, but as to the other Defendants in
21 this case, and particularly my client.

22 THE COURT: She didn't say she had any
23 trouble about that.

24 MR. LEBETKIN: She didn't say it speci-
25 fically, but the longer she talked, the more free she

1 got in what she said. She was apparently embarrassed to
2 say anything, to begin with.

3 I believe, Judge, that if that woman were
4 questioned, and of course, I am going to attempt to
5 question her also, and I would like to be clear on
6 the record, that a lot more may come out from that
7 woman than we heard on this record tonight, and it may
8 be that the entire verdict was taken, that woman was
9 the one that who, I indicated to Your Honor, leaned
10 over to Mr. Chow, earlier in the evening and wanted the
11 cross examination of Mr. Lombardino read. Now, the
12 cross examination on Roth may ver well have affected
13 Mr. Levy, because Mr. Levy was included in that conver-
14 sation.

15 I believe that some highly unusual
16 things happened here tonight, and probably some of
17 them are not known to us, and may never be known, but
18 I have an obligation to try and find out.

19 THE COURT: You may say that, but I don't
20 think that anything unusual happened. In fact, I think
21 that you had a very conscientious twelve people pass
22 upon the guilt or innocence. They demonstrated it
23 by the notes that they brought in, and by the time that
24 they spent in their deliberations.

25 As far as Mr. Chow is concerned, I would

1 make the statement: I have been on the Bench twenty-
2 eight years and I think that he is one of the most
3 exceptional jurors that we have ever had, and that these
4 notes were not taken to coerce or persuade anybody
5 unfairly. They were taken for his own refreshing of his
6 recollection.

7 I think that we would be better off,
8 in our system at times, if we had jurors of his caliber
9 and I would like to have that reviewed by the Court of
10 Appeals of the Second Circuit.

11 MR. LEBETKIN: I agree that he was
12 exceptional, but just how exceptional, I don't know.

13 THE COURT: I don't think that he had any
14 design to subvert any part of the law or the evidence.

15 MR. LEBETKIN: I don't infer that he
16 was trying to do anything wrong. He may have been
17 sincere in what he was doing, but he may have been
18 misdirected in his methods, and it may not conform to our
19 judicial system.

20 THE COURT: I will not engage in a great
21 defense. I think that the record will speak for itself
22 as to what his state of mind was. He acted as a Foreman
23 and you addressed him as Foreman in the beginning, and
24 he gave careful consideration. I did not stop him from
25 taking notes. In fact, the case law in the Court of

1 Appeals, Second Circuit, said that I could allow him
2 or permit him and it should be allowed for him to take
3 notes right through the trial.

4 But I discourage it because I know that
5 it is not a good practice, at times, to have a juror
6 taking notes, and he tries to tell other jurors that they
7 are verbatim. I think that you will find the law in the
8 Court of Appeals, Second Circuit, supports my viewpoint.
9 I am quite satisfied with him.

10 MR. LEONE: On behalf of --

11 THE COURT: I deny the Motion on
12 behalf of Mr. Levy.

13 MR. LEONE: I move to set aside the
14 verdict, based upon the fact that it is contrary to the
15 weight of the credible evidence, as obtained in this
16 trial, and I join with my other colleagues to set aside
17 the verdict based upon the fact that the statements of
18 Mr. Chow, and the statements of Number 10 Juror who,
19 also, I might add, indicated her lack of knowledge as
20 to what a conspiracy was, and the Court did not allow
21 Mr. Ryan to go into it as to whether she understood
22 what the law was.

23 And whether Mr. Chow, or whether certain
24 of her requests weren't allowed to be reviewed in Court
25 or answered.

1 THE COURT: I think that the jurors have
2 a right to tell what they think that the law was that
3 was charged, and that is part of the jury system, too.
4 That is my reaction.

5 MR. LOMBARDINO: I forgot another point,
6 if I may please put it on the record, and it might be
7 extremely important to my client.

8 I would also like to indicate for the
9 record that when Juror Number 10 was polled, the first
10 time she was asked about her verdict concerning Kevin
11 Cooney, there was no response. As a matter of fact, the
12 second time she said it, it was so soft that I certainly
13 couldn't hear her from where I was sitting. At least,
14 that was my observation.

15 In addition thereto, Your Honor, and as
16 an officer of the Court, I make this representation to
17 you.

18 When we were inquiring of Mr. Chow in
19 regard to his notes, Juror Number 5 looked over, Miss
20 Slawsby, I think her name was, and asked about the notes.
21 I couldn't hear the conversation.

22 THE COURT: That is Mrs. Slawsby.

23 MR. LOMBARDINO: And I thank the Court
24 for permitting me to make these observations for the
25 sake of the record.

1 THE COURT: You are welcome.

2 MR. DREYER: I want to respond to one
3 thing.

4 THE COURT: I think that you should
5 respond, because we are all here in the Courtroom and
6 it is nice to have this atmosphere put on the record,
7 because it can be a picture that it not true of what
8 has transpired here.

9 MR. DREYER: My recollection of Number 10
10 Juror's response to the Clerk of the Court polling
11 Juror Number 10 was that the first time she was asked
12 about the guilt of Kevin Cooney that she responded guilty,
13 but that the Clerk did not hear her, and repeated the
14 question. I heard he say guilty and I will state that
15 for the record.

16 THE COURT: That is my recollection.

17 MR. LOMBARDINO: She said guilty, Your
18 Honor. The first time there was nothing that came out of
19 the woman's voice. Someone made inquiry, and she said
20 it so soft that it just barely was heard.

21 THE COURT: Well, I heard it twice, and
22 I don't know.

23 MR. LOMBARDINO: She also remarked, Your
24 Honor, that she was confused about the law as it
25 concerned the conspiracy.

1 THE COURT: I think that -- is there
2 anything else that you want to put on the record against
3 this verdict, because you have a jury that gave
4 conscientious deliberations. In my judgement, it was
5 approaching the best that I have ever seen.

6 What I am going to do: I deny all the
7 Motions and set aside the verdict for a new trial. You
8 can pursue whatever you want, because Mrs. Earl, as far
9 as I am concerned, I am not going to restrict your
10 talking to her or finding out anything.

11 MR. LOMBARDINO: Thank you.

12 THE COURT: You should not intrude too
13 much into the jury deliberations because it is a
14 hazardous thing at times.

15 But I am going to deny the Motions and
16 stand upon that denial and I am going to defer sentencing
17 of each and every Defendant in order for a pre-sentence
18 investigation.

19 And that means the Probation Department,
20 of course, will take up the pre-sentence investigation
21 procedures, and you should try and make some arrangement,
22 counsel for each Defendant, by calling and telephoning
23 the Probation Officer and making some arrangement for
24 interviews, and so forth.

25 So, I think that I will leave it in

A560

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
-against- :
KEVIN COONEY, ET AL, :
Defendants. :
-----X

DEFENDANTS' MEMORANDUM OF LAW

Yours, etc.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-against- :

KEVIN COONEY, ET AL, :

Defendants. :

-----X
DEFENDANTS' MEMORANDUM OF LAW

PRELIMINARY STATEMENT

Defendants respectfully submit this memorandum of law in support of their application to suppress all evidence, including declarations and tangible evidence, and all evidence and information derived therefrom resulting from the incident when Andrew Blossy was stopped for speeding by Officer Ruben Vircermontes and Sgt. Robert Tripperr in New Mexico, on two separate and distinct grounds, as follows:

(a) the evidence seized, including tangible evidence and declarations, resulted from illegal search and seizure, which defendants have standing to challenge, and

(b) any alleged declarations made by Blossy are inadmissible, on grounds that a proper foundation cannot be laid to establish that they were made in the course of and in furtherance of the alleged conspiracy.

STATEMENT OF FACTS

On or about the 27th day of September, 1974, Andrew Blossy was stopped on a New Mexico road by an Officer and his sergeant for speeding. They checked the ownership of the car and determined it had not been reported as stolen. The registration was in the name of Richard Cihocki. He allegedly satisfied that the automobile was not stolen the officer wrote a ticket for speeding. While the ticket was being written, another officer asked permission of Blossy to search the trunk, which Blossy allegedly gave. He found a garment bag in which was a box containing approximately \$25,000.00. He then searched Blossy and found a piece of paper with the telephone number of defendant, Cooney on it. Subsequently, the officer telephoned Defendant, Cooney, who allegedly made damaging admissions to him.

Supposedly, Blossy told the officer that he had been hired by one, Hauser, to deliver the money to Defendant, Cooney, in a car supplied by Hauser. Were this evidence to be received, the jury would be expected to infer that Defendant, Cooney, and the other defendants have a proprietary interest in the money, which was to be used to enrich the conspirators for their alleged trafficking in marijuana. The jury would be expected to infer that Blossy was driving the vehicle, for the financial benefit of defendant Cooney and the other alleged coconspirators. Were the jury not expected to reach such conclusion, the incident in New Mexico, as well as the evidence seized would be totally irrelevant.

POINT ONE

DEFENDANTS HAVE STANDING TO CHALLENGE THE LEGALITY OF THE SEARCH OF THE VEHICLE OF BLOSSY AND ALL EVIDENCE SEIZED, TESTIMONIAL AND TANGIBLE, ON GROUNDS THAT THE THEORY OF THE GOVERNMENT IS THAT BLOSSY WAS ACTING AS AN AGENT FOR THE ALLEGED COCONSPIRATORS AND THE SAID SEIZURES, AS AN ILLEGAL INCIDENT TO AN INVESTIGATION OF A TRAFFIC INFRACTION, WAS VIOLATIVE OF THE FOURTH AMENDMENT.

At first glance, one might wonder whether there is a sufficient basis for defendants to claim standing to suppress the evidence seized by Officer Montague from Blossy. However, upon careful analysis of the reason for the offer of such evidence by the Government, it is clear that defendants have a rightful claim to standing. Indeed, it is the position of the Government that Blossy was driving the vehicle as a courier for the conspirators. It is the Government's contention that the defendants had a proprietary interest in the vehicle that Blossy drove supplied by a coconspirator and the money in the trunk. It is the theory of the Government that it was entrusted to Blossy to make a money delivery to defendant Cooney for marijuana. It would be difficult to make a more convincing case of an agent acting on behalf of his principal.

In Jones v. United States, 361 U.S. 257, 80 S.Ct. 725, 4 L.ED.2d 697 (1960), the Supreme Court was called upon to interpret Rule 41 (e) of the Federal Rules of Criminal Procedure, which grants standing a "a person aggrieved by an unlawful search and seizure," and affords the Court "discretion" to "entertain the motion (to suppress illegally seized evidence) at the trial." itself. In Jones, the Court ruled that standing does not re-

quire "extensive...property interests," but merely "a substantial possessory interest in the premises searched." Since the car and its contents were given to Blossy by an alleged conspirator, Hauser, allegedly for delivery to another alleged conspiracy, defendant Cooney, it would clearly appear that the members of the alleged conspiracy would have a sufficient proprietary or possessory interest in the car and its contents for standing, in the Fourth Amendment sense of the term.

In United States v. Mapp, 476 F. 2d 67 (2nd Circ., 1973) Defendant was charged with a conspiracy to distribute narcotics and possession thereof. The Court found that the defendant had standing to challenge the legality of a search of a women's apartment, even outside of defendant's presence, where she pointed to the narcotics. The Court held that the target of such search, defendant, had standing to challenge its legality, where he had allegedly brought the narcotics into the apartment, since possession thereof was at the core of the charge against him. The Court reasoned that where the Government theorizes that contraband was deliberately put in premises by a Defendant, he has sufficient standing to challenge any seizure of it, even if he was not present at the time of the search. The same reasoning would afford defendants standing in the case at bar, where it is reasoned that they had caused the money to be put in the trunk of a car, for the benefit of the conspiracy. Thus, a seizure allegedly made in the course of the conspiracy will afford the alleged conspirators standing to move to suppress the evidence, on grounds that the Government offers the evidence for the jury to consider their alleged proprietary interest in the property. This must be contrasted with Brown v. United

States, 411 U.S. 223, 93 C. Ct. 1965 36 L.Ed. 2d 208 (1973), where defendants, who were in custody at the time, were held to be without standing to challenge a search of the store of a co-defendant. The arrest had terminated the conspiracy and thereby terminated any interest the defendant might have had in the premises searched.

In United States ex rel Spero v. McKendrick, 266 F. Supp. 718 (S.D. N.Y. 1967), it was held that a person who loaned a vehicle to a party, enjoys standing to object to any evidence seized therefrom, despite his absence at the time of the search, a strong precedent for defendants.

The proprietary interest in the vehicle or premises searched need not be as delineated in criminal law as might be required in traditional property law cases. That the vehicle or premises has been used at the behest of the defendant and on his behalf, will usually be sufficient to afford him sufficient interest for standing. Indeed, it would be hypocritical for the Government to invite a jury to connect a vehicle and evidence to a defendant charged with profiting from their and simultaneously deny to the Court that such defendant has any proprietary interest in such property worthy of Fourth Amendment protection.

Having handled the "standing" threshold, it is submitted that all fruits of the poisonous tree must be suppressed, given that the seizures were unreasonable. This means that the alleged conversation of the police officer with defendant Cooney must be suppressed, since his telephone number came to light after Blossy was searched. Unless the Government can show that its evidence used to secure this indictment came from sources that

are untainted with the seizures herein, the indictment must be dismissed. Alderman v. United States, 391 U.S. 165, 89 S.Ct., 961, 22 L.Ed. 2d 176 (1969).

This leads to the final issue for exploration, to wit, whether the seizure was sufficiently reasonable to pass Fourth Amendment muster. The analysis thereof commences with two strikes against the Government. The officers did not have probable cause to arrest Blossy. They checked and found that it had not been stolen. Indeed, the Government does not rely upon probable cause to support the search, but rather the consent of Blossy.

According to the story of Blossy, as warranted by the officer, the former was aware that he was engaging in an illegal transaction, in transporting the money. He allegedly did not know the exact amount that was in the trunk, but knew it was a large amount; He allegedly had been approached by Hauser in the past to transport marijuana for pay and has a history of drug operations. It is therefore extremely unlikely that he would voluntarily allow the officer to look into the trunk of the car, when what was found might well be used to smooth his way to prison. When consent is attributed to a person like Blossy, the Government has a harder task to prove it voluntary, as distinguished from the circumstance where an innocent third party allows an officer to search for property. "The Government bears the burden of proving waiver, a burden which is discharged only upon a showing of clear and convincing evidence." A factor that must be taken into consideration, where consent is relied upon, is whether the donor of the evidence has been warned by the officer seizing it, that he has a

to refuse the officer permission to rummage about. United States v. Mapp, 476 F. 2d 67 (2nd Dept., 1973). The subject's knowledge of the right to refuse is a factor to be taken into account in determining whether a consent was freely given, or merely, an involuntary response to authority.

The burden of proof is on the Government where it urges that consent was freely given. This burden must be met with "clear and convincing evidence." The Government has the heavy duty of proving the state of the party's mind, whom it claims gave a free and knowing consent. That state of a man's mind is as much a fact as any other and is just as susceptible to proof. However, it is submitted that where a person knowing he has committed a wrongful act has not been warned of his right to decline to cooperate, mere testimony that he gave permission to search, in response to an official request is insufficient to prove that such consent was freely given. It would have been against his penal interest for Blossy to have given his consent to a search. Therefore, the burden of the Government is especially heavy. It is submitted that such burden, in the present state of the record, cannot be met.

It is submitted that the Government cannot possibly carry its burden of proof of consent, without producing Blossy. The officers can testify to Blossy's alleged statement on a lonely New Mexico road, far distant from home, not whether such statement was a fearful response to authority and the inherently coercive atmosphere. Indeed, it was inherently coercive for the police to request consent to search, given the circumstances.

POINT TWO

A PROPER FOUNDATION HAS NOT BEEN
LAID TO INTRODUCE INTO EVIDENCE
THE ALLEGED DECLARATIONS OF BLOSSY,
AS THE EXCEPTION TO THE RULE AGAINST
HEARSAY.

Declarations of a conspirator, as testified to by a witness, are hearsay, but admissible only with a proper foundation, to wit, that they were made in the course of the conspiracy and in furtherance thereof. The declaration itself cannot be used, however, to prove the declarant's participation in the conspiracy. There must be independent evidence thereof. United States v. Berger, 433 F. 2d 680 (2nd Cir., 1970); Carbo v. United States, 314 F. 2d 718 (9th Cir., 1963).

The alleged declarations of Blossy to Officer Montague were certainly not in furtherance of the conspiracy, but merely declarations of a narrative nature that can only be binding upon the declarant. Bruton v. United States, 391 U.S. 123, 88 S. Ct., 1620, 20 L.Ed. 2d 476 (1968). It is not necessary to go beyond this, to exclude the declarations. However, they are inadmissible for another reason. The declarations aside, there is no independent evidence that the declarant was a member of the conspiracy. Even if there were, however, the narrative quality thereof, rather than conspiratorial furthering, bars the declarations from being used.

CONCLUSION

EVIDENCE SEIZED FROM BLOSSY, AS WELL
AS DECLARATIONS MADE BY HIM ARE
INADMISSIBLE AND THE INDICTMENT SHOULD
BE DISMISSED UNLESS THE GOVERNMENT
PROVES THAT ITS EVIDENCE WAS NOT

AS69

TAINTED BY THE EVIDENCE SEIZED FROM BLOSSY.

Respectfully submitted,

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5. During March or April of 1973, Marc COHEN transported approximately 300 pounds of marijuana for COONEY and attempted to temporarily store it at KATZ'S residence, Morris Street, Albany, New York, since COHEN was unable to locate LEVY. KATZ alleges he rejected the idea and that COHEN subsequently located LEVY and delivered the marijuana to him.
6. KATZ alleges LEVY approached him to transport a load of marijuana for COONEY from Tucson to LEVY in Albany. KATZ transported the marijuana sometime during May of 1973 and was paid \$1,400.00 cash by LEVY. Prior to KATZ leaving Albany, LEVY advised him there was \$30,000.00 in the trunk of the vehicle that was to be delivered to COONEY. However, KATZ states he never physically checked to see if the \$30,000.00 was in the trunk of the vehicle. When KATZ arrived near Tucson, he telephoned COONEY with a telephone number supplied by LEVY. COONEY subsequently met KATZ and took possession of the vehicle. KATZ alleges that he observed COONEY'S stash of marijuana to be located in a two-family house, which COONEY rented under the assumed name of CONWAY.
7. KATZ states that Marc COHEN transported one other load of marijuana, but cannot recall the date this took place. However, it took place sometime between KATZ'S shipment in May of 1973 and his second and last shipment of August 1973. In August of 1973, KATZ transported approximately 350 pounds of marijuana from COONEY in Tucson to LEVY in Crescent, New York. KATZ advises that he was paid \$1,500.00 in marijuana by LEVY for his service.
8. KATZ further said that Bruce KAY and Sondra HUNT became the principal couriers for COONEY beginning with the fall of 1973. In addition, KAY was often assisted by Joan FLEISHER (KAY'S present wife). KATZ specifically recalls that KAY delivered a load of 650 pounds of marijuana in a camper pick-up truck during February or April of 1974 to LEVY in Crescent, New York.
9. KATZ alleges that Christine COONEY was not a participant in COONEY'S operation. (However, this is in direct contradiction to statements supplied by other witnesses.) Additionally, KATZ states that although

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- Sandra BROOKS did participate, she did so reluctantly and only because she was married to Harold LEVY. KATZ contends that this dispute eventually led to their divorce.
10. KATZ states that COONEY'S operation was directed towards Albany, Ithaca and Buffalo, New York; Chicago, Illinois, and Colorado. Additionally, pound quantities of heroin and cocaine were delivered by John LEFEBVRE to the New York City, Philadelphia and New Jersey areas for Kevin COONEY. In Ithaca, New York, the operation was headed by Martin WISNER. KATZ contends that between September of 1972 and April of 1975, approximately 15,000 pounds of marijuana was delivered to LEVY in Albany, New York, and that approximately 25,000 to 35,000 pounds of marijuana was delivered to WISNER in Ithaca, New York. KATZ further states that a Tony LNU and Michael LNU were actively involved with WISNER in the operation in Ithaca.
 11. In the early months of 1974, John LEFEBVRE moved to Tucson, Arizona so that he could be closer to Kevin COONEY. It was subsequent to this that LEFEBVRE began supplying pound quantities of heroin and cocaine.
 12. Cathi HESSON was a distributor of marijuana for Harold LEVY in Albany, New York, in addition to which, during part of 1974, Cathi HESSON went to Tucson, Arizona and personally assisted COONEY with the operation.
 13. KATZ has identified an additional courier of COONEY'S to be Thomas JEROME, formerly of Saratoga, New York, and now a resident of Vermont.
 14. KATZ contends that LEVY received his last shipment of marijuana in April of 1975. Subsequently, Bruce KAY took over this end of the operation. KAY based himself in Vermont and supplied the Vermont and Albany, New York areas.
 15. KATZ has confirmed that LEVY is the owner of a 35-38 foot Viking Boat, valued at approximately \$40,000.00 which is moored in Miami, Florida. LEVY purchased this boat from his profits derived from his participation in COONEY'S organization.

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16. The following is a partial breakdown of COONEY's organization:

MEXICO

TUCSON

Cooney

COLORADO

CHICAGO

BUFFALO

ITHACA

ALBANY

Wishner

Levy/Kay

Rausser

Roth

Tony LNU

Barney

Michael LNU

Kay

Katz

Moskowitz

Lefebvre

Hession

KATZ states that he generally purchased half of LEVY'S marijuana shipments and subsequently distributed his marijuana to the following:

Curtis PONZI	50-100 pounds	(average)
Ralph CLICK	25-50 pounds	(average)
John TIBBETTS	1-2 pounds	(average)
Paul CAMUSO	50-200 pounds	(average)
Richard HESSING	25-50 pounds	(average)

Paul CAMUSO sold his marijuana to Thomas PICCARILLO and John NICOTRO and John LEFEBVRE sold his marijuana to Marc COHEN, Alan LNU and sometimes to Cathi HESSION and friends of Cathi HESSION.

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17. KATZ states that COONEY'S marihuana was delivered to him by Mexicans utilizing false bottom/flat bed trucks. COONEY purchased the marihuana by the ton and only paid for it subsequent to the successful delivery by the Mexicans. KATZ further states that COONEY and LEVY split expenses and losses on a 50-50 basis. COONEY alleged to LEVY that he paid \$65.00 per pound for the marihuana (KATZ believes that \$35.00 per pound is more accurate) and that LEVY was to sell the marihuana for approximately \$110.00 to \$125.00 per pound. Therefore, KATZ assumes, based on the aforementioned statistics that COONEY made \$50.00 and LEVY made \$25.00 on every pound of marihuana that was successfully delivered. (The Tucson District Office has advised that between 1972 and 1974, the average price paid for a pound of marihuana delivered from Mexico to Tucson was approximately \$30.00 to \$40.00 per pound).
18. This report is in essence a concise summary of information supplied by KATZ during the interview. This report has neither been shown to KATZ nor adopted by him.

PHYSICAL DESCRIPTIONS:

1. COONEY, Kevin Thomas, aka CONWAY; NADDS No. 246239.
2. COONEY, Christine H.; NADDS No. 283792.
3. LEVY, Harold J.; NADDS No. 367043, 364796.
4. KATZ, William Carroll; NADDS No. 361903, 366254, 368117.
5. COHEN, Marc; NADDS No. 365344.
6. KAY, Bruce; NADDS No. 364206.
7. HUNT, Sandra Louise; NADDS No. 365930.
8. BROCKS, Sandra Marie; NADDS No. 365997.
9. LEBESVRE, John David; NADDS No. 365009, 367196.

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PROGRAM CODE

10. HESSIGN, Cathi Anne; NADDIS No. 358691.
11. BERRY, Myron H.; NADDIS No. 312019.
12. PONZI, Curtis Richard; NADDIS No. 375528.
13. CLICK, Ralph Michael; NADDIS No. 420996.
14. TIBBETTS, John R.; NADDIS No. 375959.
15. CAMISO, Paul; NADDIS No. 409769.
16. HESSING, Richard B.; NADDIS No. 464388.
17. WISNER, Martin, aka Marty; DOB 4-1-49. Formerly resides at Ithaca, New York. Has New York State Police Arrest No. 28393. No further data available at this time. No NADDIS No.
18. JERINGS, Thomas; No NADDIS No. Believed to be currently residing in Vermont. No further data available at this time.
19. KAY, Joan nee FLEISHER; No NADDIS No. Wife of Bruce KAY. No further information available.
20. PICCAFELLO, Thomas; No NADDIS No. White male, 5'9", 180 lbs., with black short hair. About 23 years of age.
21. NICOTO, John; No NADDIS No. White male, 6', 165 pounds, with black curly hair. About 25 years of age.

OFFICIAL USE ONLY

Bureau of Narcotics and Dangerous Drugs

Department of Justice

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COPY 5

COURT'S TRIAL EXHIBIT: CHOW'S NOTES

12/9/76

(4)

- ① R. Roth Thurs.
 ② M. Cohn Friday
 ③ W. Katz Tues & wed. (Morning aft., wed - morning)
 ④ P. ~~Kenn~~ Kuno - wed. (afternoon)

Seneca Falls, N.Y.

- ④ played Golf with K & introd. L.

Obtained M. from Lafavre and paid \$420. (check)
 Cohn told source of M. from Ariz. (Remembered by name of Kory (?) but never met him).

Money confiscated from Mexico - about 35,000. (loss to be equally divided between L. K.).

After Levy informed that he will leave the business in the area and B. Katz will take over the operation.

Gave \$12,000 to ~~Katz~~ Katz to get M. from Calif.

No

Katz & Nogales, Mexico did not substantiate.

Katz, Philip Neil (?) Columbia M.
 (Chain, Alan Kaplan)

Sid Rockwell, Calif. & Katz got M. from him ~~to Katz~~

Katz is a decent person
 95% of M. count Kaplan & Katz
 (\$6600 owed to Levy)

Mosowitz owned guns, used before gave to Kuno. shot aimed at person.

John Nicolo, Pickle (?)

Misc. to L. Ranger by Sr. Silvers

Hirsch, Holzman (Pharmacist)

Kowle Mooney
 Harold (Bud) Levy
~~Willie~~
 Bruce Kay ~~Lafare~~ Lafare (?),

Lombardino
 Labague
 Leone
 Jos. Brian

R. Roth, Mitchell Kogen?

(2)

Mark Cohen. (Master Deq., working on purchasing with a steel co. ^{Writes a memo & writes re. Herd.})

1. VW broke down on NY thruway.

2. Transport M from Virginia

3. Flew from Albany, with his wife to Union AV3
 Kaven K. & wife picked him at airport.

4. Stayed 2-5 days left with M to N.Y.

Can ~~proof~~
 Vented from
 his under
 me of

That night stayed in a hotel in Phoenix
 2 1/2 days back to N.Y., drove to 85 Old London Rd.
 del. to Levy.

2 story house, 1 small Rm, closet, a small Vard table (C)
 with marble top and scales and saw on.

5. ~~Proof~~ proof + expenses.

Can
 hgl.

5. 6 was later drove with to Katz as

12/9/76

(B)

Agent Fipps &

March 31, 1973 benefit concert & met H. from Laforee.

Met Laforee 10 times rather 5-6 times on the
statements made to Grand jury on Jan. 1976.Got 2 #5s from Laforee at 1st rather than 1# as stated to
Grand jury.

12/10/76

Mozambique =

- ① Described 86 Q. L.R. back room no furniture except
a round small table (4') with marble top. Saw & scales
on. ~~Tool~~ Tool box in the room.
- ② End of Jan. went to Denver Colo. to attend ^{bro.} Ind.
jewelry and art conv. phoned to K.C.
- ③ Opened Blue sky on 1970 Central Ave. to sell
jewelry & Am. western cloth.
- ④ Sunny & Cris came to stayed with him for 1 wk
& opened the store
- ⑤ Cris sent a basket with a letter in (exhibit) dated
6-10-73 1973.
- ⑥ Visited K.C. at Tucson Ariz.

(7) Went to Mexico with K.C. by this Volvo
~~intended~~ opened the trunk took a green bag
 to inside
 Came back with luggage and put it back to
 trunk
 introduced to Pasquel

(8) Habit forced him to spend 800-1200 W.K. asked
 K.C. to give him for transportation
 Went there & came back & deliver to H.L. at
 8:5 O.I.R. (Got 1200)
 San R.R., W.K. there

(9) Met F.R., W.K. - Mac-ties

(10) Went to Crisan. Made the table there.
 One tie B.K. with copper
~~opened~~ Under to a bed of the copper, M. was in

(1) Lina 9 year old daughter, hospitalized needed
 surgery, threatened to blow the case open, took for
 money from K.C.

(2) Went to K.C.'s place & Mexico in the state of Luis

(3) Wished ^{may} Janet Beaker (?) indicted

(4) Never knew a woman can burst.

7. Did not know what happened afterward.

Lambertino : expert

Dec. 15 - 76

1. Sargent Ring.
2. Linda Hansen
\$25,450,
3. Sgt Montague

Dec. 16 - 76

Tapes for 2 Conferences let cover 2 Masawitz.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

: 76 CR 12

-against-

: NOTICE OF MOTION

KEVIN T. COONEY, HAROLD J. LEVY, JR.,
JOHN LeFEBVRE and BRUCE KAY,

:

:

Defendants.

:

-----X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affidavit of MELVIN M. LEBETKIN, sworn to the 3rd day of January, 1977, the minutes of the verdict, and all of the proceedings heretofore had, Defendants, COONEY, LEVY and LeBEBVRE will move this Court at a Term for Motions to be held at the Court-house at the United States Post Office Building in Albany, New York, on the 17th day of January, 1977, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an Order pursuant to Rule 33 of the Federal Rules of Criminal Procedure to set aside the guilty verdict and for a new trial and for a full evidentiary hearing, on the grounds that the Court failed to properly instruct the jury on the crime of conspiracy when a juror indicated confusion and on further grounds that the notes taken by Juror Number One were misused by him prior to jury deliberations and for a full evidentiary hearing on the issue and for such other and further relief as to this Court may be deemed just and proper.

DATED: Kew Gardens, New York
January 3rd, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-against- :

: AFFIDAVIT OF ATTORNEY

KEVIN T. COONEY, HAROLD J. LEVY, JR., :
JOHN LeFEBVRE and BRUCE KAY, :

Defendants. :

-----X
STATE OF NEW YORK)
COUNTY OF QUEENS) SS:

MELVIN M. LEBETKIN, being duly sworn, deposes and says that he is the attorney for the Defendant, HAROLD J. LEVY, JR., and respectfully submits this Affidavit in support of the motion of Defendant LEVY, JR., in which counsel for Defendants, COONEY and LeFEBVRE join, to set aside the verdict of the Jury and for a new trial and for a full evidentiary hearing on the facts hereinafter set forth.

The Defendants herein were charged by indictment with the crime of conspiracy to traffic in marijuana. No tangible proof of the corpus delicto was offered, but merely the testimony of alleged accomplices that such unlawful agreement, in fact, did exist. For most criminal prosecutions, proof of the corpus delicto can be independently presented. In a prosecution for conspiracy to traffic in controlled substances, the naked accusation of an accomplice is usually the only evidence that such a crime, in fact, ever took place. It is for that reason that procedural safeguards should be particularly observed and applied with sensitivity, where the indictment owes its genesis

to such charge.

The jury rendered a verdict of guilty against all four codefendants. On polling, Juror Number Ten indicated indecisiveness concerning the guilt of Defendant, BRUCE KAY, and confusion concerning the law of conspiracy:

"JUROR NO. 10, JUDITH EARL: I definitely feel pressure on this decision.

THE COURT: What kind of pressure? Did you listen to the opinions of the other jurors?

JUROR NO. 10, JUDITH EARL: Yes. I have requested that we ask your Honor to review the legal advice, or the legal charge that you gave us about the conspiracy, relating to the part where they said that they would have to be involved in only a small portion of conspiracy, or not to be convicted--

THE COURT: Well, isn't that--

JUROR NO. 10, JUDITH EARL: I don't know."

THE COURT: Wasn't that made clear to you?" (P.12*)

Miss Earl failed to answer the inquiry of the Court and the Court failed to pursue the representation by Miss Earl that she was confused concerning the law of conspiracy. One of the defense lawyers, Joseph W. Ryan, Jr., attorney for Defendant, KAY, attempted to further interrogate Miss Earl, but the Court refused to allow him to do so:

"MR. RYAN: May I inquire?

COURT: No, I am going to accept the verdict." (P.15)

It is strongly urged that the Court had a duty to instruct the jury again on the law of conspiracy and send the jury back for further deliberation, or at the very least to make further inquiry whether Juror Number 10 was, in fact, confused on the law of conspiracy and if so, take such steps to further instruct and direct further deliberations.

In view of the fact that Juror Number 10 indicated her confusion concerning the law of conspiracy, all four defendants have been prejudiced by the failure to further instruct the jury or at least to make inquiry. Unfortunately, the Court cut off counsel when he attempted to inquire, leaving the state of the record reflecting that a juror wanted further instructions to relieve her confusion, but having been pressured by her fellow jurors not to make her request known to the Court.

It is strongly urged that the verdict of guilty should be set aside, for the reason aforesaid.

There is a second infirmity that impairs the verdict. Given that Juror Number One, Mr. Chow, properly took notes of the testimony with Court permission, defendants are entitled to an evidentiary hearing to determine whether Mr. Chow used those notes in conversations with his fellow jurors prior to official deliberations or improperly during deliberations. Juror Number Ten, Judith Earl, after Mr. Chow represented to the Court that he had destroyed his notes, told the Court that "there are notes in there, written by him" (P. 18) Mr. Chow conceded that he made notes in the jury room concerning testimony "and sometimes it was during the evening, and sometimes it was when we were just in the jury room and I jotted down some of the points." (P.21) However, inquiry was not made whether these notes that were drafted during the trial were used in conversations with Mr. Chow's fellow jurors as the case progressed. It is fundamental that jurors should not discuss a case until the evidence is in because they had not heard all of the evidence, they have not heard the instructions of the court as to how this evidence is to be considered by them and they have not heard the arguments of counsel.

Were these notes used for premature discussion, it is submitted that such misconduct will require the verdict of the jury be set aside as would improper use during deliberations. The record is insufficient from which a determination can be heard on this issue and so, a hearing should be ordered.

Rule 33 of the Federal Rules of Civil Procedure requires that a motion to set aside a verdict and for a new trial be made within seven days of verdict or within such time as extended by the Court within seven days of verdict. On December 28th, 1976, six days from the verdict, Chief Judge James T. Foley granted Melvin M. Lebetkin, attorney for Defendant, Levy, Jr., over the telephone an extension of time until January 5th, 1977, for all the defendants to serve and file a motion for a new trial, on grounds the Court Reporter at that time had not completed the verdict minutes, which were material and necessary to draft this motion. Therefore, this application has been timely made.

WHEREFORE, Defendants, Cooney, Levy, Jr., and LeFebvre pray for an Order pursuant to Rule 33 of the Federal Rules of Criminal Procedure to set aside the verdict and for a new trial and for a full evidentiary hearing and for such other and further relief as to this Court may be deemed just and proper.

MELVIN M. LEBETKIN

Sworn to before me this
day of Janaury, 1977

JOSEPH A. FARALDO
Notary Public, State of New York
No. 24-6231427 - Kings County
Term Expires March 30, 1977

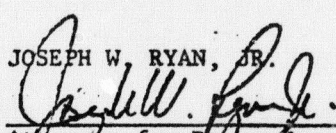
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :
- against - : Cr. No. 76-CR-12
BRUCE KAY, : NOTICE OF MOTION
Defendant. :
-----X

PLEASE TAKE NOTICE that, upon the annexed affidavit of JOSEPH W. RYAN, JR., sworn to January 4, 1976 and Memorandum of Law, and upon all the proceedings had herein, the undersigned will move this Court before the Honorable James T. Foley, Chief Judge for the United States District Court for the Northern District of New York at the United States Courthouse, 445 Broadway, Albany, New York on January 17, 1977 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order granting a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Dated: Mineola, New York
January 4, 1977

JOSEPH W. RYAN, JR.


Attorney for Bruce Kay
114 Old Country Road
Mineola, New York 11501

TO:

HON. PAUL V. FRENCH
United States Attorney for the
Northern District of New York
Federal Building
Albany, New York 12207

ANTHONY V. LOMBARDINO, ESQ.
Attorney for Kevin T. Cooney
108-18 Queens Boulevard
Forest Hills, New York 11375

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-X

UNITED STATES OF AMERICA :

- against - :

AFFIDAVIT

BRUCE KAY, :

Defendant. :

Cr. No. 76-CR-12

-X

JOSEPH W. RYAN, JR., being duly sworn, deposes and
says:

1. This Affidavit is submitted on behalf of the
defendant, BRUCE KAY, in support of a Motion pursuant to Rule 33
of the Federal Rules of Criminal Procedure for a new trial in
the "interest of justice."

2. The basis for this Motion is the defendant's
contention that the verdict returned against him did not consti-
tute a unanimous verdict by twelve jurors who were convinced of
the defendant's guilt beyond a reasonable doubt. We respectfully
submit that the record demonstrates that Juror No. 10, Mrs.
Judith Earl, returned a verdict of guilty only because of coer-
cive influences brought upon her both in the Jury Room and in
the Courtroom at the time of polling. Despite her acquiescence
with the majority, the record reveals that this juror never was
convinced of the defendant's guilt beyond a reasonable doubt.
To the contrary, the record shows unequivocally that Mrs. Earl
honestly had a reasonable doubt as to the defendant's guilt
during the polling process, and that she had attempted to
explain to the Court's satisfaction that the only reason she had

voted guilty was because of the pressures brought upon her by the other eleven jurors, and her exasperation in unsuccessfully seeking to persuade the other eleven jurors of the correctness of her honest conviction.

3. To understand the basis for the foregoing contention, it is necessary to briefly recall the circumstances under which these revelations were made by the juror, Judith Earl. Following a lengthy four week trial, the jury began its deliberations at approximately 12:10 p.m. on Wednesday, December 22, 1976. The record of the deliberation shows that there was a substantial question amongst the jurors concerning the evidence of defendant, BRUCE KAY'S alleged involvement in the conspiracy. Pursuant to its request, the jury heard a reading of William Katz' testimony at approximately 4:30 p.m. concerning the alleged delivery of marijuana by defendant, BRUCE KAY, to Katz' home in Albany, New York. It will be remembered that, after the first reading of this testimony, Mrs. Earl stated through the foreman that she wanted read that portion of Katz' testimony where the defendant, Harold Levy, was alleged to have given a reason for the delivery to have taken place at Katz' home, namely, because repair work was being done at Levy's house. We point this out to show the Court that Mrs. Earl was taking an active participation with the other jurors in evaluating the evidence as to defendant, BRUCE KAY.

4. The jury took its only break in the deliberations between 6:00 p.m. and 7:15 p.m. to leave the Courthouse for dinner. Before leaving for dinner, however, a jury note requested further reading of testimony concerning defendant,

BRUCE KAY. One note requested a reading of the testimony of Paul Moskowitz concerning the alleged unloading of marijuana from a camper by defendant, BRUCE KAY, at Harold Levy's home. After returning from dinner, the jury heard the requested testimony read to them at approximately 9:00 p.m. After further deliberations, another note was received from the jury concerning the defendant, BRUCE KAY. This note requested the reading of the cross-examination of Paul Cammuso concerning defendant, BRUCE KAY. When the jury entered the jury box to hear the reading of this testimony, the Court Reporter informed the jury that it would take approximately a half hour to read such testimony. I recall that most of the jurors winced when they heard that it would take such time to read this testimony. We point this out to show the Court that these deliberations were at a point when the jury was weary, tired and pressing to reach a definitive verdict as to all defendants, particularly BRUCE KAY. After the reading of the testimony, the Court inquired of the foreman, Mr. Chow, whether the jury would prefer retiring for the evening and resuming deliberations the following morning. Mr. Chow stated that the jury wished to continue further deliberations. Within a half hour later, the jury sent its note that it had reached a verdict.

5. At approximately 11:35 p.m., the foreman, Mr. Chow, read the verdict from a piece of paper. After reading each defendant's name, the foreman announced the verdict "Guilty." Each defense counsel then requested that the jury be polled as to their respective clients. This portion of the trial has been transcribed, and the transcript has been filed with the Court.

There are, however, several errors in the transcript which we will point out to the Court as we proceed in setting forth the circumstances under which the polling was conducted.

6. The jury was first polled as to the defendant, Kevin Cooney, and continued with each defendant in the order of the Indictment. On the first poll, Mrs. Earl answered that her verdict as to defendant, Kevin Cooney, was guilty, but her voice was so inaudible that it was necessary for the Clerk to request her verdict a second time, to which she answered guilty. I recall observing this juror. She appeared to be a woman who was exhausted and exasperated over what was an apparent intense struggle to obtain her vote. But, as to defendant, Kevin Cooney, she reaffirmed her guilty vote without any explanation, and the polling continued. On the second and third polls as to defendants, Harold J. Levy, Jr. and John Lefebvre, Mrs. Earl announced, without any explanation, that her verdict was "Guilty."

7. On the last poll as to the defendant, BRUCE KAY, Mrs. Earl was asked for her verdict. Before giving her verdict, she gave an explanation (Tr., pp. 10-11):

JUROR NO. 10, JUDITH EARL: I would like to say not sure, but I say guilty because of the others -- realizing that all --

THE COURT: (Interrupting)
Speak right out.

JUROR NO. 10, JUDITH EARL: I would like to say, not sure, but realizing that I am not going to persuade eleven jurors to change their vote.

THE COURT: What is your verdict, your judgment?

JUROR NO. 10, JUDITH EARL: Guilty.

I recall the manner in which Mrs. Earl gave this explanation by shaking her head negatively. Her facial expressions and tone of voice indicated that this woman was in anguish over the fact that she felt she had no alternative but to vote guilty despite her honest conviction that there was a reasonable doubt as to the defendant, BRUCE KAY'S guilt.

8. This observation is substantiated by the subsequent events revealed by the transcript. The polling continued of Juror Nos. 11 and 12 as to their verdict, and each answered "Guilty." At this point I stood up prepared to object to the verdict. Then the Court returned to make further inquiry of Mrs. Earl concerning her verdict. The initial inquiry itself demonstrates that Mrs. Earl was voting guilty solely because of the coercive pressures of being the sole dissenting juror. The transcript shows the following (Tr., pp. 11-12):

THE COURT: Miss Earl, I am going to ask you, particularly on this last call that we had: Did you surrender any convictions because of any pressures on you, or is that your judgment that you find that this defendant Kay is guilty? You have to use your own judgment.

JUROR NO. 10, JUDITH EARL: I definitely feel pressures.

THE COURT: What did you say?

JUROR NO. 10, JUDITH EARL: I definitely feel pressures.

THE COURT: I can't hear you.

JUROR NO. 10, JUDITH EARL: I definitely feel pressure on this decision.

9. Having admitted three times that she had tendered her vote under "pressure," the Court sought to ascertain the

nature of the pressures. Mrs. Earl attempted to explain that she had asked the other jurors to request a rereading of the Court's charge concerning the requirements to find an individual defendant guilty of becoming a member of a conspiracy. The other jurors had rejected her request. The transcript does not reveal that Mrs. Earl further told the Court that the other jurors explained to her what the law required in that regard, and that the Court responded that it was not unusual for jurors to consult each other on the law, and further asked Mrs. Earl whether she understood the Court's charge. As the transcript shows, Mrs. Earl responded: "I don't know." The Court asked, "Wasn't that made clear to you?"

10. At this point, Mrs. Earl began to explain other phases of the case against defendant, BRUCE KAY, upon which she had a reasonable doubt. (Tr., pp. 12-13)

JUROR NO. 10, JUDITH EARL: The other point that I had some doubt on, and I am only saying this because of my reasonable doubt, and I feel that it is reasonable, was the points that were made about Bruce Kay taking over the conspiracy, and I felt that I have reasonable doubt about that. (Emphasis added)

Here again, the transcript does not accurately reflect everything Mrs. Earl said. I recall that Mrs. Earl specifically mentioned that she could not accept the testimony concerning the Friar Tuck Restaurant meeting between Kay, Levy and Paul Cammuso, where Levy was alleged to have said that Kay was taking over the operation.

11. Having been informed by Mrs. Earl that she had a reasonable doubt, and that her vote was tendered under pressure, the Court did not declare a mistrial or direct the jury to

continue further deliberations either that same night or the next morning. Instead, the Court further questioned Mrs. Earl in the presence of the eleven other jurors, the defendants and counsel. At this point, there can be no question that Mrs. Earl was being singled out for her dissenting view as revealed by her attempted explanations and frank expressions of doubt. It is true that the Court felt an obligation to obtain clarification of her vote before accepting the verdict. This was undoubtedly because the Court recognized that it could not accept the verdict in view of Mrs. Earl's clear expressions of doubt as to defendant, BRUCE KAY'S guilt, and her admission that she felt no alternative but to acquiesce in the votes of the eleven other jurors. This was a frightened, scared woman who gave honest feelings and thoughts to the Court. But the Court's continuing and persistent questioning could only have impressed upon this juror that she would invite some adverse consequences, either to the trial or to herself if she insisted upon expressing her innermost thoughts concerning defendant, BRUCE KAY'S guilt. Mrs. Earl undoubtedly concluded in the face of the continued questioning that the easier course to avoid the apparent displeasure created by her disclosure would be to vote "Guilty." We respectfully submit that this view of the proceedings is borne out by the following interrogation. (Tr., pp. 13-14):

THE COURT: Well, I have to inquire, because we are in an awkward position: You were polled here and the question is, do you find Kay guilty under the law as I charged you, and on the testimony given in this case.

How old are you?

JUROR NO. 10, JUDITH EARL: 25

THE COURT: And was any coercion placed upon you to return a verdict here?

JUROR NO. 10, JUDITH EARL: No. I don't -- I mean the only one I felt unsure of, having any doubt on, was that last defendant, was Bruce Kay, and I have --

THE COURT: You may have felt, but did you finally reach a conclusion that you want reported and made part of the verdict in this case?

JUROR NO. 10, JUDITH EARL: Yes, I said that I do.

THE COURT: And you do that freely, and that is the point that we are trying to find out. Are you under any pressure? It is your judgment, your own mind has to make the decision.

There was a lengthy pause before the next answer.

JUROR NO. 10, JUDITH EARL: I can see (concede) that Bruce Kay is guilty.

12. The transcript erroneously quotes Mrs. Earl as stating that she "can see" that Bruce Kay is guilty. The Court will recall, and the Court Reporter will undoubtedly confirm, the fact that Mrs. Earl "conceded" that Bruce Kay was guilty. Before the jury was discharged, the Court Reporter sought clarification from Mrs. Earl on this point. Mrs. Earl spelled the word concede for the reporter so that there would be no doubt as to her concession. This language used by Mrs. Earl best illustrates the fact that she was, indeed, acquiescing in the vote of the majority, despite her honest conviction that she had a reasonable doubt as to defendant, BRUCE KAY'S guilt.

13. Once Mrs. Earl conceded defendant, BRUCE KAY'S guilt, the Court asked, "Do you say he is guilty?" Mrs. Earl answered, "Yes." The Court announced: "Now, I am going to take her verdict and her judgment. That happens in many

instances when reasonable doubt arises in the minds of the jurors, that your judgment has to be made." Because the Court's acceptance of the verdict was not satisfactory to the defendant, BRUCE KAY, I attempted to interpose my objection. But, it was interrupted by the Court propounding another series of questions to Mrs. Earl (Tr., pp. 14-15):

THE COURT: Do you find he is guilty?
I am going to ask you directly.

JUROR NO. 10, JUDITH EARL: Yes, I find that he is guilty.

THE COURT: That is your finding as a juror, to apply the law and listen to the facts and the testimony and reach a judgment, and is that your judgment?

JUROR NO. 10, JUDITH EARL: Yes, sir.

THE COURT: Is it?

JUROR NO. 10, JUDITH EARL: Yes, sir.

THE COURT: Now, is the time to express it. You have two things, guilty or not guilty.

JUROR NO. 10, JUDITH EARL: Guilty.

THE COURT: All right.

MR. RYAN: May I inquire?

THE COURT: No, I am going to accept the verdict.

14. We view the foregoing exchange as a demonstration that Mrs. Earl simply capitulated her position in the face of the Court's questioning. For the Court to say: "Now is the time to express it. You have two things, guilty or not guilty" was simply presenting an ultimatum to this juror. By this time, after twelve hours of deliberation and in the middle of the night, it is understandable that this woman sought to avoid the continued questioning before the jury, defendants and counsel

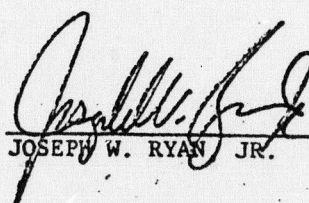
which singled her out as the only one who could prevent this case from being terminated, and the jury sent home for the Christmas holiday.

15. No one can ignore what was on everybody's mind in the Courtroom. The deliberations were encroaching upon the Christmas holiday. It would be unrealistic for anyone to say under the circumstances that this jury was not intent on reaching a conclusion to this case before the deliberations infringed on their ability to free themselves for the holiday.

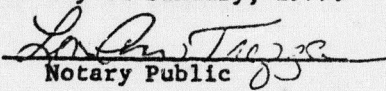
16. Based upon all of the foregoing circumstances and the principles of law set forth in the annexed Memorandum of Law, we respectfully submit that the verdict must be set aside and a new trial ordered because the defendant, BRUCE KAY, did not receive a unanimous verdict of twelve jurors who were convinced of his guilt beyond a reasonable doubt.

WHEREFORE, your deponent respectfully requests that the Motion be granted.

Dated: January 4, 1977
Mineola, New York


JOSEPH W. RYAN JR.

Sworn to before me this
4th day of January, 1977.


Notary Public

LOU ANN TREZZA
NOTARY PUBLIC, State of New York
No. 30-4610011
Qualified in Nassau County
Commission Expires March 31, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

76-CR-12

KEVIN T. COONEY, HAROLD J. LEVY, JR.,
CHRISTINE H. COONEY, SANDRA BROOKS, a/k/a
SANDRA BROOKS LEVY, WILLIAM KATZ, JOHN
LE FEBVRE, ELLEN KAPLAN, SANDRA L. HUNT,
MARC COHEN, BRUCE KAY, CURTIS PONZI, JOHN
TIBBETTS, MICHAEL P. HAUSER, RALPH CLICK,
ROBERT ROTH, MICHELLE KOVEN, and CATHI A.
HESSION

APPEARANCES:

OF COUNSEL:

HON. PAUL V. FRENCH
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U. S. Post Office & Courthouse
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Bayside, New York 11361

JOSEPH J. RYAN, JR.
Attorney for Defendant Kay
114 Old Country Road
Mineola, New York 11501

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

The indictment herein in Count I charged seventeen named persons with conspiracy to distribute quantities of marijuana in violation of Title 21 United States Code, Section 841(a)(1). Of the seventeen named, four defendants, Cooney, Levy, LeFebvre and Kay went to jury trial on Count I.

The case was submitted to the jury on December 22, 1976, after the instructions ended at 11:05 a.m. Their deliberations continued

throughout the day and a verdict of guilty for the four defendants was returned at 11:35 p.m. that night. During the individual polling of the jury, there was a comment by Juror No. 10, Mrs. Judith Earl, concerning her state of mind of the guilt of defendant Kay, and also there developed during this individual polling, comments concerning the taking of notes during the trial by Juror No. 1, Charles Chow, and the use of his personal handwritten notes during the jury deliberations. After these incidents and interrogation by me of the two jurors about them, I allowed and directed the verdicts of guilty to stand and to be so recorded. Immediately thereafter, at my request, motions by the defense attorneys were made on behalf of each defendant to set aside the verdicts and for entry of judgment of acquittal, but denied from the Bench. Fed. R. Crim. P. 29(c).

To be discussed herein and decided are now present two formal, written motions to set aside the verdicts and grant a new trial under Fed. R. Crim. P. 33. One motion is in behalf of defendant Kay, based upon the comments of Juror Earl in regard to her verdict of guilty of Bruce Kay when polled individually; and the other motion is jointly for the other three defendants, requesting the verdicts to be set aside and for a new trial based upon the same question, and also upon the note-taking by Juror Chow. In the submissions on the motions, the attorneys had a transcript made that covers the incidents only from the time request was made for individual polling of the jury after the verdicts of guilty of the four defendants had been read by the Foreman for each one in open court, with the clerk in each instance inquiring collectively, "And so say you all." For purposes of this discussion, I have had transcribed and shall file with the Clerk of the Court the minutes that cover the objections and discussion after my motions, the caution to Juror Chow early in the trial on December 2, 1976, by me, in the presence of all other jurors in the jury box about note-taking, and the statements

and comments made when the jurors returned to open court for reading of testimony on a substantial number of occasions. These minutes to my mind are very pertinent and illuminating on the questions presented.

Each defendant was individually represented by experienced counsel who were vigorous in their advocacy; several being relentless in their prolonged and pounding cross-examination of government witnesses. I allowed extensive cross-examination of the government witnesses because it was evident and agreed that credibility of these witnesses, being in the category of accomplices for the most part, was an important issue in the case. Of the other named defendants in the indictment, several had dismissals or received extremely light sentences under 21 U.S.C. §841(b) and provisions of the Youth Corrections Act. There was no question in my mind that unrestricted cross-examination should be allowed to fully develop for the defense, and for careful jury consideration, any interest or treatment of these accomplice witnesses in relation to possible motivation for such witnesses to falsify their testimony. The trial lasted for approximately three weeks and, as previously noted, on the night of the first day of their deliberation, the jury returned their verdicts literally at the eleventh hour of that day, 11:35 p.m., December 22, 1976.

Following the usual procedure, the verdicts of the jury, covering each defendant separately, were requested by the courtroom Deputy Clerk, and upon the clerk's requesting the verdict for each defendant after naming him, Foreman Chow, reading from a note, announced guilty until all four defendants by separate requests by the clerk for each defendant were covered. There was no disagreement orally with each announcement of the verdict of guilty nor any outward sign of any disagreement by any juror in the jury box. All defense counsel then requested individual polling of the jury pursuant to Fed. R. Crim. P. 31(d).

In the polling for each of the four defendants, in the order agreed upon by all counsel, guilty responses were given by all jurors for three defendants, LeFebvre, Levy and Cooney, until comment was made by Juror No. 10, Mrs. Judith Earl, in polling her individually, in regard to her verdict concerning the guilt of defendant Kay. It was then in this last polling concerning defendant Kay, that she made the response that caused further inquiry by me as to her state of mind concerning the guilt of defendant Kay, and to find out in view of her comments whether the verdict should be accepted and recorded as a unanimous verdict of the twelve jurors required to find defendant Kay guilty as charged. Her first response to the poll by the courtroom Deputy Clerk with regard to defendant Kay was:

I would like to say not sure, but I say
guilty because of the others -- realizing
that all --

Proceeding of December 22, 1976 at 11:35
p.m., at p. 10.

This comment, and the colloquy which I found it necessary to pursue thereafter, has spawned the two separate motions to be discussed herein. It should be noted again that defendant Kay, in his motion, relies solely upon this incident that happened with Juror No. 10, while the other three defendants not only rely upon this question, but further rely upon alleged impropriety in the note-taking by Juror Chow and the use of such notes during the jury deliberations. Both of the instant motions, pursuant to Fed. R. Crim. P. 33, consist of the notice of motion, a single affidavit of counsel, a legal memorandum and the selectively limited transcript of the jury polling. Counsel for defendant Kay applied for, was granted and gave oral argument on January 26, 1977, but the joint motion on behalf of the other three defendants was simply submitted for decision on the papers.

By characterizing Juror No. 10, Judith Earl, in one submission on his motion as "not a confused juror . . . [but rather] an active juror . . . [who] expressed herself clearly . . ." [Defendant Kay's

Memorandum of Law, filed January 10, 1977] and in another as "a frightened, scared woman" [Affidavit of Counsel, attached to Notice of Motion, filed January 10, 1977], counsel for defendant Kay contends that her comments must be considered as expressions of reasonable doubt as to Kay's guilt which, it is argued respectfully, she was coerced into by pressures from the Court's questioning and by the presence of the other members in the jury box. Also, it is suggested that she was personally fatigued from the late hour of the proceedings at the time the verdict was taken in open court after the day long deliberations.

Defendants Cooney, Levy and LeFebvre view the comments and answers by Juror No. 10 to my questions as indicating her general confusion concerning the conspiracy portions of the jury charge. None of the counsel for these defendants made any specific objection to the charge in this respect. They also contend, in argument which is difficult for me to accept, that Juror No. 10's equivocation as to the guilt of defendant Kay should be read to undermine her unequivocal vote of guilty on the verdicts rendered against defendants Cooney, Levy and LeFebvre whom they represented. The argument seems to be one that could only be based upon a theory of osmosis because to me the doubt that she willingly expressed about Kay, I believe reinforces the conclusion that she had no doubt of the guilt of the other three defendants. Additionally, although attorneys for these defendants did not object to my allowance of jury note-taking with my cautions, particularly to Juror No. 1, Mr. Chow, who was selected as Foreman and whose note-taking was visible to all, they now contend that a post-verdict hearing should be held to determine if the Foreman made improper use of his personal notes during the jury deliberations. Counsel for defendant Kay, as pointed out in his motion, does not raise this issue in any way in his separate motion for a new trial and, indeed, stated at his oral argument that this note-taking was discretionary with the Court under ruling of the Court of

Appeals, Second Circuit.

Blackstone said that trial by jury is the glory of the law. The jury system has been long accepted as the best way, unless waived, to dispense justice fairly in the American system of justice. This jury deliberation process by laymen is particularly important and desired in criminal prosecutions. The responsibility of determining guilt or innocence, always a difficult assignment, is placed on ordinary citizens who must grapple with complex legal principles and reconstruct facts and search for the truth from evaluation of the testimony of many witnesses with the right to decide the part that should be accepted as reliable and supported by credible evidence. Of course, the most serious aspect of this process is when the twelve individual persons must deliberate for the first time as a group and must then speak with one voice. The give and take and the compromise in jury deliberations which such a process necessarily involves was well described by [former] Chief Judge Lumbard in Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1033 (2d Cir. 1971) (concurring opinion). His common sense view of the jury functioning as a reasonable group of men and women who are willing to change their views is the only way such a decision making process could work effectively. The judge described succinctly what jury deliberation is all about.

After duly inquiring as to the meaning and import of this comment by Juror No. 10, and after having observed her other behavior during the course of the trial and jury deliberations, it is my firm judgment that there is no reason to doubt that she intended to and did record a guilty verdict with respect to defendant Kay which was voluntary and free from coercion and from reasonable doubt. See United States v. Brooks, 420 F.2d 1350, 1351 (D.C. Cir. 1969). Based on this finding, there could be no basis for any inference of confusion regarding Juror's No. 10 unequivocal vote of guilty on the verdicts against Cooney, Levy and LeFebvre.

The occurrence where a juror does not express her vote in precise legal parlance or in the form requested by the courtroom clerk during polling is not unknown in the federal courts. Similar incidents have been presented to the various courts of appeals for review and their decisions can be divided into two categories where the intent and result of the trial judge's colloquy was to clarify or to translate the express vote of a juror into non-ambiguous legal terms and the other category where colloquy is deemed coercive or was done in such fashion to cause a hesitant juror to actually vote in open court. Amos v. United States, 496 F.2d 1269, 1273 (8th Cir. 1974), cert. den. 419 U.S. 896 (1974).

The situation which developed here in the colloquy with Juror No. 10 bears, in my opinion, after review of the transcript, no resemblance to those cases which defendants rely upon as indicating coercion. To my mind, after my questioning at the actual scene, I was satisfied from her answers that Juror No. 10, Mrs. Judith Earl, had reached a guilty verdict as was indicated by no disagreement on her part orally or by physical demonstration when the verdict was taken collectively and read out by the Foreman of the jury. It was evident from the manner in which the jury came into the courtroom after informing the Deputy Marshal they had reached a verdict on all defendants that the guilty verdict of defendant Kay was not one formed in open court by Juror No. 10 nor a forced one, compelled to be given for the first time in open court; see United States v. Sexton, 456 F.2d 961 (5th Cir. 1972); nor was this a situation where a juror was given the sole alternative of voting "yes" or "no" without allowing full expression, explanation or further qualification of their vote. See United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970). There is unquestionably an affirmative obligation on the trial court to clear up any apparent confusion in instances of this kind and to determine a juror's vote or expressions in a poll when it is not articulated in "the precise forms submitted to it under

court's instructions", or when it is not strictly in the parlance of the courtroom. See Cook v. United States, 379 F.2d 966, 971 (5th Cir. 1967). There is no verdict if there is any uncertainty concerning unanimity of the twelve, and it has been held as error for a trial court to ignore, prohibit, or fail to clarify such expressions made by jurors during the polling procedure. United States v. Edwards, 496 F.2d 1362; see Rogers v. United States, 422 U.S. 35 (1975); Jones v. Estelle, 538 F.2d 651 (5th Cir. 1976) (per curiam); United States v. Mathis, 535 F.2d 1303, 1307 (D.C. Cir. 1976); 8A Moore's Federal Practice - Criminal Rules ¶31.07. The court in Edwards remarked, along lines similar to Chief Judge Lumbard's view, that:

Jurors are laymen, unskilled in the fine distinctions of the law. When a juror states that he has doubts, the trial judge should be alerted to the probability that there may not be unanimity in the verdict. Id., 496 F.2d at 1367.

When a response to a jury poll is given as guilty with qualification, the trial judge is put in the delicate position of determining whether the vote is in reality one of guilty with a level of certainty as required beyond a reasonable doubt or whether it is something less certain which requires further deliberations by the jury pursuant to Fed. R. Crim. Pro. 31(d). This task must be accomplished without delving too deeply into the motivation and rationale for the vote. United States v. Lockhart, 366 F. Supp. 843, 849 (E.D. Pa. 1973), affirmed without opinion, 495 F.2d 1369 (3rd Cir. 1974). There are three areas of determination in such an event: First, was the juror's vote truly his own and free from any coercion? United States v. Duke, 527 F.2d 386, 394 (5th Cir. 1976), cert. denied, ____ U.S. ____, 44 U.S. Law Week 3738 (June 21, 1976); Jackson v. United States, 386 F.2d 641 (D.C. Cir. 1967) (per curiam). Secondly, the court must determine whether there is any confusion about the court procedure in fully understanding the charge, the polling procedure of the jury

or the meaning of the juror's response. United States v. Brooks, supra, 420 F.2d at 1351; Williams and Coleman v. United States, 419 F.2d 740 (D.C. Cir. 1969) (en banc). Finally, it must be determined whether the vote itself is for guilt beyond a reasonable doubt, or whether the juror's expressions indicated a lesser degree of certainty which necessitates further jury deliberations under Fed. R. Crim. Pro. 31(d).

As the record shows, after the culmination of my direct questioning, in my judgment, Juror No. 10 expressly indicated overall, conclusively and finally, that her vote on defendant Kay was for guilty beyond a reasonable doubt and that it was her own vote -- free from any coercion. It is also important that Juror No. 10, to my observation was an attentive and an active member of the jury. She requested on her own upon the return to the jury box of the jury that certain portions of testimony be re-read and thereafter expressed satisfaction with the re-reading. Transcript of Jury Deliberations, December 22, 1976, at pp. 33, 35 and 54. It is inappropriate to speculate as to her views during the course of deliberations except to acknowledge that even if, arguendo, she joined the majority on the jury later on in the deliberations or for purposes of unanimity and rendering a verdict, this is neither improper or even abnormal. See Grace Lines, Inc. v. Motley, supra; Cook v. United States, supra.

As noted before, this trial was quite lengthy and the attorneys, prosecution and defense, proceeded with vigor and strong advocacy, yet absolute courtesy to each other and to the Court, and decorum prevailed at all times. The record and the minutes of the courtroom clerk show that the jury actually deliberated in their jury room for a relatively short period of time and exhibited to my on-the-scene observation no signs of animosity, hostility or impatience with each other upon their substantial number of returns to the courtroom. In fact, their attitude was one of friendliness and respect to each other with evident determination to render final decision in the

case that night, despite my express offer to terminate their deliberations and to return the following morning to continue.

Counsel for defendant Kay requested an opportunity to interrogate the jury before they were excused, which request was denied at that time. Transcript of Proceeding at 11:35 p.m., supra, pp. 31-32. Upon his oral argument of this Rule 33 motion, counsel as I recall after he searched the pertinent case law commendably conceded he had no right legally to so question the jury during the polling. See Miller v. United States, 403 F.2d 77, 83-84 (2d Cir. 1968); cf. Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224, 225 (D.C. Cir. 1942); Curry v. Moore McCormick Lines, Inc., 51 F.R.D. 301, 303 (S.D.N.Y. 1970). There was no request or motion made by any attorney for direction to have the jury deliberate further before the jury was finally excused. See Jackson v. United States, supra, 386 F.2d at 643; see also United States v. Duke, supra, 527 F.2d at 394; Amos v. United States, supra, 496 F.2d at 1273; United States v. McCoy, supra, 429 F.2d at 742. The failure to so move during the trial is not considered a necessary factor in denying these motions since it is my judgment as the trial judge who participated actively, there is no merit to defendants' contention that Juror No. 10 did not render an uncoerced vote of guilty upon the indictments of all four defendants, including defendant Kay or that her votes were not based on understanding of the instructions or should be considered as other than ones made of her own volition. From my observations, there was no disagreement by any outward manifestation by any juror in the jury box when Foreman Chow announced the verdicts of guilty for each defendant before the individual polling was conducted. In light of my determination that defendant Kay suffered no prejudice during the polling procedure and that the verdict of guilty should stand as a unanimous one against Kay, it follows unquestionably that the verdicts against Cooney, Levy and LeFebvre, in which there was no hesitation by any juror in

the individual polling, must stand and the motions in their behalf based on this ground also be denied.

These three defendants, excepting defendant Kay, do present the alternate ground for a new trial based on the allegation that Mr. Chow, selected by the jurors under our system as the Foreman, did make or might have made improper use of his notes and the Court should, at the least, have conducted a hearing to determine whether such improper use during jury deliberation was made of these personal notes. It should be emphasized again that defendant Kay makes no claims on this challenge to the note-taking, admittedly discretionary in the Second Circuit. See United States v. Bertolotti, 529 F.2d 149, 159-60 (2d Cir. 1975).

As I commented to the attorneys after the jury was excused, I considered Mr. Chow to be "one of the most exceptional jurors that we have ever had . . ." Transcript of Proceeding at 11:35 p.m., December 22, 1976, supra, at pp. 36-37. In regard to his note-taking, no objection was made when I first observed it to my granting permission to take notes or to my cautionary instructions given at that time. See Transcript of Proceedings on December 2, 1976. There were objections made by defense counsel after the verdict which amounted to a contention that whenever a juror takes notes, the court should conduct a hearing pro forma, to investigate their use. I did have the juror go back to the jury room and obtain the notes available, and those notes were marked into the record as a court exhibit. The notes as I read them are cryptic, with summaries of witnesses' testimony, with no comments about evaluation of the truth or worth of such testimony. There is nothing shown in the record or elicited by my questioning that would support any suspicion that Foreman Chow made improper use of his personal notes that were made during recesses or after court sessions. See Transcript of Proceedings of 11:35 p.m., December 22, 1976, supra, at pp. 15-24. I have filed as stated those portions of his notes which were available as Court

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Exhibit No. 10, and have reviewed them myself. To describe them again: They are simply a cryptic chronicle of the times the various witnesses testified and the briefest description without conclusions drawn of the highlights of their testimony. Since the trial covered a three-week period with interruptions that occurred due to other responsibilities of the Court, with a large number of witnesses examined and cross-examined, I find no basis to suggest that either the note-taking by this exceptionally intelligent juror or their use to refresh his memory of the testimony was improper.

Finally, I find no merit to the suggestion that the lateness of the hour or the day long deliberations with the incidents described in the individual polling amounted to serious problems that should warrant the setting aside of the verdict and the granting of a new trial. Careful inquiries were made of the jury concerning their ability and desire to continue deliberations at 9:45 p.m. [Transcript of Jury Deliberations of December 22, 1976 at pp. 39-48] and at 10:40 p.m. [Id., at pp. 48-55]. The jury stated through its Foreman, after he looked at the others in the jury box for their state of mind, that the jury wished and were willing to continue their jury deliberations. It is important to point out, in my judgment, as the presiding judge on the scene, that the jury deliberations were as uneventful and dispassionate as I have ever observed at the conclusion of a long criminal jury trial. There was no thought of giving a modified Allen charge, which is the only one I give when necessary, because really with all the time consumed in reading substantial amounts of testimony and the departure of the jury from the building for an hour and a half or more to have dinner at one of Albany's finest restaurants, located just across the street, the deliberations cannot be considered as prolonged ones which would bear down or tax the stamina of the jury to such an extent as to overcome their independent convictions as to the guilt of these defendants.

There was no indication to me or observation at the actual

trial scene that we had a weary and tired jury which was unduly and unfairly pressed to agree to a verdict after an exhausting day, as the counsel for defendant Kay attempts to portray. This beleaguered jury picture, painted by defense counsel, simply was not the fact as the record of jury deliberations, their return into the courtroom on several occasions, and their unanimous agreement to continue indicates. The jury had their lunch arranged for them to eat shortly after my instructions ended at 11:05 a.m. The jury came back a number of times during the day after notes were given to the Deputy Marshal for the Court which notes contained precise and pointed questions therein concerning parts of the testimony the jury desired to read. The notes are part of the record. Significant time was also consumed for the attorneys and court reporters to agree on the portions of the testimony to be re-read. There were no requests for any clarification of the instructions that were given or any such indication in the notes when the jurors returned to open court that the jury wanted the Court to give further clarification of the instructions.

No matter the attempt to dramatize a slight ripple in an otherwise uneventful trial and jury deliberation into an incident of utmost gravity and seriousness, it must be remembered that the jury returned its verdict at 11:35 p.m. of the same day. The entire incidents of polling the jury individually after the collective agreement on guilty verdicts, the subsequent questioning of jurors Earl and Chow by the Court, the hearing of motions for each defendant to set aside the verdicts, according to the courtroom Deputy Clerk's minutes [filed with this decision] was over by 12:15 a.m.; surely not an inordinate amount of time. The questioning of both jurors could not have exceeded a 15 to 20 minute period at the most. It should be said that there was no handwringing or sobbing on the part of Juror Earl after she expressed her doubt, in a soft spoken manner, about the guilt of Kay; there was no emotional scene at all. To my

observation, she was only stating, in her own way, the difficulties she had to overcome and that were on her mind in order to resolve the doubts and agree with the other jurors concerning defendant Kay. Unless it was completely out of character, at least as observers have described, in the past, my courtroom attitude and manner as a trial judge, there was no intent on my part by the content of my questions or the tone of delivery to coerce or pressure in any way Juror Earl from expressing the verdict she wanted to render. Of course, it is self-serving, but my interpretation of the transcript is that she voluntarily and without coercion expressed joinder in the verdict of guilty against defendant Kay.

In conclusion, the two separate motions for a new trial, on behalf of defendant Kay and jointly on behalf of defendants Cooney, Levy and LeFebvre, under Fed. R. Crim. Pro. 33, for a new trial are denied and dismissed. The verdicts of guilty shall stand against all defendants and the sentencing scheduled for Tuesday, February 22, 1977, shall take place.

It is so Ordered.

Dated: February 15, 1977

Albany, New York

Thomas T. Foley
UNITED STATES DISTRICT JUDGE

United States of America vs.

United States District Court for

DEFENDANT

KEVIN T. COONEY

Northern District of New York

DOCKET NO. ➤

76-CR-12

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date ➤

MONTH	DAY	YEAR
Feb.	22	1977

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Melvin M. Lebetkin

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of wilfully, knowingly and unlawfully combining, conspiring, confederating and agreeing, together and with each other, to commit an offense against the United States, to wit: to violate 21 USC §841(a)(1), from about July 1972 through June 1975, at or near Albany, N.Y.; that the object and purpose of said unlawful combination, conspiracy and agreement was to wilfully, knowingly, intentionally and unlawfully distribute a Schedule I controlled substance, to wit: quantities of marijuana, in violation of 21 USC §846.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen months with a special parole term of two years, on Count one.

SENTENCE
OR
PROBATION
ORDERSPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

Chief U.S. District Judge

Date

February 22, 1977

Albany, N.Y.

United States of America vs.

UNITED STATES DISTRICT COURT for

DEFENDANT

HAROLD J. LEVY, JR.

Northern District of New York

DOCKET NO. 76-CR-12

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Melvin M. Lebetkin

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTYFINDING &
JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of wilfully, knowingly and unlawfully combining, conspiring, confederating and agreeing, together and with each other, to commit an offense against the United States, to wit: to violate 21 USC §841(a)(1), from about July 1972 through June 1975, at or near Albany, N.Y.; that the object and purpose of said unlawful combination, conspiracy and agreement was to wilfully, knowingly, intentionally and unlawfully distribute a Schedule I controlled substance, to wit: quantities of marijuana, in violation of 21 USC §846.

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RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

Chief U.S. District Judge

Date

February 23, 1977

Albany, N.Y.